111-242
Oct Term 1883

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 280.

JOSEPH TEAL, PLAINTIFF IN ERROR,

vs.

JAMES D. WALKER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

FILED AUGUST 27, 1881.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 280.

JOSEPH TEAL, PLAINTIFF IN ERROR,

vs.

JAMES D. WALKER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

INDEX.

	Original.	Print.
Writ of error	1	1
Complaint	3	1
Summons	23	11
Demurrer to complaint	24	12
Order setting cause for hearing on demurrer	25	12
" "	26	12
Order of hearing on demurrer and taken under advisement	27	13
Order overruling demurrer, with leave to answer	28	13
Opinion by Judge Deady	29	13
Order extending time in which to answer	32	21
Order allowing defendant further time to answer	33	21
Stipulation extending time to answer	34	21
Answer	35	22
Reply	39	24
Notice to set cause on docket for trial	42	25
Order setting cause for trial when jury is present	43	26
Order setting cause for trial on Monday, June 6, 1881	44	26
Affidavit of H. Y. Thompson	45	26

	Original.	Print.
Order allowing plaintiff and defendant to change No. of block in complaint and answer	47	27
Motion for leave to file amended answer	48	27
Order on application for leave to file amended answer	49	28
Notice of application for leave to file amended answer	50	28
Order denying motion for leave to file amended answer—jury	52	29
Findings of jury	53	30
Verdict	54	30
Judgment	55	31
Motion for a new trial	58	32
Plaintiff's bill of costs	60	33
Objections to bill of costs	62	34
Order setting motion for new trial for hearing	63	34
Order continuing hearing of motion for new trial	64	35
Motion for new trial taken under advisement	65	35
Order denying motion for new trial, &c.	66	35
Præcipe for execution	67	36
Execution	68	36
Marshal's return on execution	69¼	37
Bill of exceptions	70	37
Citation	82	42
Bond on appeal	84	43
Copy of writ of error	86	44
Clerk's certificate	88	45

1 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Judges of the Circuit Court of the United States for the District of Oregon, Greeting:

Because in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between James D. Walker and Joseph Teal, a manifest error hath happened, to the great damage of the said Joseph Teal, as by his complaint appears. We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be
2 done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court affixed, at Portland, in said district, this 28th day of July, 1881.

R. H. LAMSON,
Clerk of the Circuit Court of the United States for the District of Oregon.
By P. LEONARD,
Deputy Clerk.

Endorsed: No. 658. Joseph Teal, plaintiff in error, *vs.* James D Walker, defendant in error. Writ of error.

2½ In the Circuit Court of the United States for the District of Oregon. April Term, 1881.

Be it remembered that on the 5th day of August, 1880, there was duly filed in the circuit court of the United States for the district of Oregon a complaint, in words and figures as follows, to wit:

3 *Complaint.*

In the Circuit Court of the United States for the District of Oregon.

JAMES D. WALKER, Plaintiff,
vs.
JOSEPH TEAL, Defendant.

The plaintiff, for cause of action against defendant, shows and alleges—

That he is, and at all the times hereinafter mentioned was, an alien and a subject of the Queen of the United Kingdom of Great Britain and Ireland, and defendant is, and at all the times hereinafter mentioned was, a citizen of the State of Oregon.

That heretofore, and on the 19th day of August, 1874, B. Goldsmith was the owner in fee simple of and in possession of the undivided half of a large tract or parcel of land in Linn county, State of Oregon, known as the Teal and Goldsmith farm, and another large tract or parcel of land, situate partly in Polk county and partly in Benton county, State of Oregon, known as the Teal and Goldsmith farm, and the whole of the James Athup Donation Land Claim in Clackamas county, State of Oregon.

That upon said day said B. Goldsmith conveyed to Henry Hewett said lands by a deed of conveyance, absolute in form, but for
4 the purposes and upon the trusts expressed in a separate paper and agreement on that day executed by Joseph Teal, B. Goldsmith, James D. Walker, and Henry Hewett, of which the following is a copy:

Whereas B. Goldsmith, of the city of Portland, Oregon, has borrowed of James D. Walker, of the city of San Francisco, California, the sum of one hundred thousand dollars, for which he has executed his promissory note, and the same, with this instrument and with the deeds hereinafter mentioned, are to be delivered contemporaneously and take effect at the same time, of which promissory note a copy is in letters and figures following, to wit:

$100,000. PORTLAND, OREGON, *August 19th*, 1874.

Two years after date without grace, for value received, I promise to pay to James D. Walker, or order, one hundred thousand dollars, with interest thereon at the rate of one per cent. per month from date till paid, interest to be paid monthly; principal and interest to be paid in gold coin of the United States, and not otherwise, at the office of Falkner, Bell & Co., in the city and county of San Francisco, California; and if there be default in the payment of interest for the period of twenty days, then the whole sum, principal and interest, shall, at the option of the holder of this note, be immediately due and payable; provided that at any time after
5 one year from date, before maturity of this note, the same or any installment not less than twenty thousand dollars, exclusive of interest, may at my option be paid on thirty days' notice to the holder.

(Signed) B. GOLDSMITH."

And whereas Joseph Teal, of the city of Portland, Oregon, in consideration of said loan and the advance of the said $100,000 by said Walker to said Goldsmith, has agreed to become surety for said Goldsmith to the extent of his, said Teal's, interest and estate in the lands described in the deeds hereinafter mentioned and not otherwise, and at the request of said Goldsmith the security for the pay-

ment of said money is taken by said Walker in the form of trust deeds or deeds with a separate declaration of trust by way of mortgage instead of mortgages proper; and said B. Goldsmith and Emma, his wife, and Joseph Teal and Mary E. Teal, his wife, as parties of the first part, have executed to Henry Hewett, of the city of Portland, Oregon, as party of the second part, absolute warranty deeds, (upon their face,) as follows:

1. A deed for divers tracts of land, amounting in the aggregate to about 6,000 acres, more or less, situate in Linn county, Oregon, which lands are owned at the date of said deed by said Goldsmith and Teal, and were purchased by them from H. A. Davis and one Hoffman, and other parties, and are more particularly described in said deed.

6

2. A deed for divers tracts of land, situate in Polk and Benton counties, and amounting in the aggregate to about 4,000 acres, more or less, held and owned by said Goldsmith and Teal at the date of said deed, and purchased by them from Henry Fuller and other persons, which lands are more particularly described in said deed.

3. A deed for a tract of land, situate in Clackamas county, Oregon, known as the Athey Donation Claim, containing about 605 acres, more or less, owned by said Goldsmith and Teal.

And whereas for the same purpose and as a part of the same transaction, B. Goldsmith and Emma, his wife, executed and delivered to Henry Hewett, contemporaneously herewith, certain other absolute warranty deeds (on the face thereof) for lands at the date of said deeds held and owned by said B. Goldsmith alone, as follows, to wit:

1. A deed for divers tracts of land situate in Clackamas county, Oregon, being parts of all the donation claims of Andrew Hood, James McNary, and Thomas Waterbury, and amounting in the aggregate to about 1,440 acres, more or less, more particularly described in said deed.

7

2. A deed for divers tracts of land in Multnomah and Washington counties, purchased mostly by said Goldsmith from Isaac Myer, and amounting in the aggregate to about 1,200 acres, more or less, more particularly described in said deed.

3. A deed for divers tracts of land situate in Clarke county, Washington Territory, being the Wm. Kelly claim, and other parcels in said deed described, and amounting in the aggregate to about 2,350 acres. more or less.

4. A deed for divers tracts and parcels, patented to B. Goldsmith by the United States, and situate in Washington Territory, mostly in townships 31, 32, and 33 north, of range 2 east, and containing about 3,700 acres, more or less, more particularly designated and described in said deed. All which deeds bear date the 19th day of August, 1874, and are delivered contemporaneously herewith.

Now these presents, made by Henry Hewett, aforesaid, party of

the first part, said B. Goldsmith and Joseph Teal, party of the second part, and said James D. Walker, party of the third part, witness: That said parties, in consideration of the premises, mutually agree and declare, each to and with each, as follows, to wit:

8 1st. Said Hewett holds the legal title to all the lands in the above-mentioned deeds described in trust, and to the uses herein declared.

2d. Subject to the legal title in said Hewett as aforesaid, said Teal and Goldsmith, or Goldsmith alone, shall retain and have possession of and control over all the said lands, and enjoy and have without account the issues, rents, and profits thereof until such time as the promissory note above described shall become due, and being overdue, remain thirty days unpaid, and upon such default in payment being made, said Goldsmith and Teal and Goldsmith will and shall, on demand, peaceably surrender to said Hewett, or his representatives, or successors in said trust, the possession of all said lands and every parcel thereof, to be by him disposed of as herein provided; it being understood and agreed that until and up to the time that said default in payment of said note shall happen, and said possession of said land delivered to said Hewett, or his successors in trust, the said Goldsmith and Teal and Goldsmith will and shall pay all taxes of every sort and name, and all assessments and public charges levied on, or becoming a lien on, said land, and that if they fail to so pay in due time such taxes, changes, and assess-

9 ments, the said trustee may pay the same, and whatever sum he may so pay shall be added to the principal debt against said B. Goldsmith, and shall be repaid, with interest at one per cent. per month from date of payment, out of said lands, and be deemed a lien thereon.

3d. If the above recited promissory note, and the interest thereon, and all the taxes, charges, and assessments on said land, be duly paid by said Goldsmith, or for him, then the deeds aforesaid shall be deemed void, and said Hewett, or his representatives or successors in trust, shall reconvey all said lands, and every parcel thereof, to said Teal and Goldsmith, or said Goldsmith, or their representatives entitled thereto. But if the said Goldsmith shall fail to pay the above-described promissory note, or the interest thereon, and default being so made so that according to the tenor of said note the same shall be thirty days overdue, then said Henry Hewett, or his successors in trust, may and shall proceed and take possession of said lands, and on thirty days' notice in writing to said Teal and Goldsmith and Goldsmith, or said B. Goldsmith, requiring them to pay said debt, (including also any delinquent taxes, or any taxes paid by said trustee as hereinbefore provided,) and on their failure so to pay, shall sell the same at public auction on not more than thirty days' public notice, either in parcels or in a body, (that

10 is to say, the Linn county lands in a body, and the Polk county and Benton county lands in a body or in parcels,) at the option of said trustee, and such sale shall be (if made) for cash,

and the party of the third part may at his option, being the highest bidder, become and be the purchaser, taking and applying the land purchased, upon and in satisfaction in full or *pro tanto* of the debt aforesaid; and said parties of the second part covenant and agree, that if upon such sale any other or further deed, release, or conveyance by them, or either of them, may be necessary to convey their interest to the purchaser, or shall be demanded by such purchaser to quiet his title, they and their heirs or representatives will and shall make, execute, and deliver the said deed, release, or conveyance at their own cost and charge.

It is expressly understood, however, that when sufficient lands have been sold to pay said debt and charges, the residue of said lands remaining in the name of said trustee, are to be reconveyed over to said Teal and Goldsmith, or Goldsmith alone, as the right may be. And upon sale of said lands, or any portion of them, the said trustee is to dispose of the proceeds of sale in manner following, to wit:

1. Pay thereout the costs, expenses and charges of sale, and
11 the reasonable charges of the trustee for the making of such sale and the deeds thereunder.

2. Pay thereout any delinquent taxes, or refund and reimburse said trustee for his payment of any such taxes or assessments on said loan, with interest, as herein provided.

3. Pay and satisfy said promissory note and interest, according to its terms.

4. Any residue of money left pay over to said Teal and Goldsmith and Goldsmith, or their representatives.

4th. It is agreed that if, at the expiration of one year from date hereof, or at any time thereafter before the maturity of said note, said Goldsmith and Teal shall desire to dispose of any portion of said lands so as to make a payment on said principal sum in said promissory note named to an amount not less than $20,000, the trustee, said Henry Hewett, or his successor in trust, shall so dispose of the same and sell it at prices not under the fair and reasonable value thereof, at private sale, to wit:

For the lands in Linn county, as aforesaid, not less than $60,000.
For the lands in Polk and Benton counties, not less than $35,000.
For the Athey land claim in Clackamas county, not less than three thousand dollars, $3,000.
12 For the lands aforesaid of B. Goldsmith in Clackamas county, not less than $7,000.
For the lands aforesaid of B. Goldsmith in Multnomah and Washington counties, not less than $4,000.
For the lands of B. Goldsmith in Washington Territory, not less than $8,000.

5th. In the event that there be no sales made by the trustee herein appointed, or his successor, and said lands be simply recon-

veyed to said Teal and Goldsmith, the said trustee shall be reimbursed and repaid by said Goldsmith for all his reasonable expenses in making, acknowledging, and recording deeds and conveyances, and all necessary traveling expenses connected with his trust; and in case of advertisement and sale, to pay debts as herebefore provided; and Goldsmith will also pay all reasonable charges and expenses of making such sales.

In witness thereof, the said parties hereto set their hands and seals this 19th day of August, 1874.

(Duplicate.)

(Signed) B. GOLDSMITH. [L. S.]
" JOSEPH TEAL. [L. S.]
" HENRY HEWETT. [L. S.]
" JAS. D. WALKER. [L. S.]

In presence of us as witnesses:
E. D. SHATTUCK.
S. FROHMAN.

13 That on the 18th day of October, 1876, B. Goldsmith was the owner in fee simple of and in the possession of the parcels of land described as the south half of lots 2 and 7, in block 38, in the city of Portland, in Multnomah county, State of Oregon, and he was on said day the owner in fee simple of and in possession of the undivided half of the north half of lot 6 and the undivided half of the south half of lot 7, in block numbered two, in the city of Portland, in Multnomah county, State of Oregon, and on said day he conveyed all of said lands to Henry Hewett, but upon the trusts and for the uses mentioned and provided for in a separate contract executed that day by B. Goldsmith, Henry Hewett, James D. Walker, and Joseph Teal, of which the following is in substance a copy:

Whereas B. Goldsmith, on the 19th day of August, A. D. 1874, being indebted to James D. Walker in the sum of one hundred thousand dollars, did execute and deliver to him his certain promissory note of that date for said sum, payable in gold coin of the United States, with interest thereon at the rate of one per cent. per month, payable monthly in like coin; and to secure the payment of said note, said B. Goldsmith and Emma, his wife, and Joseph Teal and Mary E. Teal, his wife, did execute
14 to one Henry Hewett absolute warranty deeds to certain lands, and for the same purpose and at the same time said B. Goldsmith and Emma, his wife, did execute and deliver to said Henry Hewett absolute warranty deeds to certain other lands owned by said Goldsmith alone.

And whereas, at the time of the execution of said note and deeds, and as a part ot the same transactions, Henry Hewett, aforesaid, as party of the first part, and B. Goldsmith and Joseph Teal, as parties of the second part, and James D. Walker, party of the third part, entered into a written agreement (a copy of which is hereto attached,) which, together with said note and deeds, were delivered and took

effect at the same time. And whereas said promissory note became due and payable on the 19th day of August, A. D. 1876, and no part of the principal sum thereof has been paid, excepting the sum of three thousand two hundred and fifty (3,250) dollars, leaving a balance of ninety-six thousand seven hundred and fifty (96,750) dollars due and unpaid; and the said B. Goldsmith is desirous of obtaining an extension of time of one year in which to pay the said balance of the principal sum of said note, and is desirous of paying
the interest thereon as follows: At the rate of one-twelfth of
15 ten per cent. per annum thereof monthly, and the remaining
two-twelfths thereof at the expiration of one year from the date hereof. And whereas as further and additional security for the payment of said sum of $96,750, now due upon said note, and the interest thereon as the same shall become due and payable, the said B. Goldsmith and Emma, his wife, have, by their warranty deed absolute, conveyed to said Henry Hewett the south half of lot numbered two (2), and the south half of lot numbered seven (7), in block numbered thirty-nine (39), in the city of Portland, Multnomah county, State of Oregon.

And the said B. Goldsmith and Emma, his wife, and Joseph Teal and Mary E. Teal, his wife, have executed to said Henry Hewett absolute warranty deeds to the north half of lot numbered six (6), and south ½ of lot numbered seven (7), in block numbered two (2), in said city of Portland, and those certain lots or tracts of land situate in Linn county, State of Oregon, described as follows: The fractional N. W. ¼, fractional N. E. ¼ of the S. W. ¼, N. ½ of the S. E. ¼, and the S. E. ¼ of the N. E. ¼ of section 8, T. 15 S., R. 2 W., containing about $161\frac{74}{100}$ acres; and the E. ½ of the N. E. ¼ and the N. W. ¼ of the N. E. ¼ of section 25, T. 15 S., R. 3 W., containing 120 acres; and the N. W. ¼ of section 30, T. 15 S., R. 2 W., and the
north half of the donation claims of Thomas S. Mills and
16 wife, being claim No. 45, notification 4722, T. 15 S., R. 2 west,
and also fractional lots numbered 2, 3, and 4, section 18, T. 15 S., of range 2 west, and the N. E. ¼ of section 19, and fractional lots numbered 1, 2, 3, and 4 of section 19, T. 15 south, range 2 west, *to be held in trust by the said Hewett*, as all other lands heretofore conveyed to him by said Goldsmith and Teal, and referred to in said agreement are by him held, and for the uses and purposes herein named and mentioned, and in said agreement specified.

Now, the presents made by Henry Hewett, aforesaid, party of the first part, and B. Goldsmith and Joseph Teal, parties of the second part, and said James D. Walker, party of the third part, witnesseth: That said parties, in consideration of the premises, mutually agree and declare, each to and with each, as follows: The said Henry Hewitt holds the legal title to all the lands herein above described or mentioned in trust, and to the same uses and purposes which he holds the lands mentioned or referred to in the agreement of August 19th, 1874, a copy of which is hereto attached, and for the additional and further purposes hereinafter named. The parties of

the second part, in consideration of the extension of the time of the payment of said note for a period of one year from the date hereof, undertake and agree that the said Goldsmith will
17 promptly pay one-twelfth of ten per cent. per annum of the interest upon the upaid principal of said promissory note, each and every month, and at the end of the year he will pay the whole of said principal and the remaining two twelfths of the interest specified in said note upon said principal sum of $96,750.00. And in default of the payment of said principal sum or interest as herein above specified, the whole of said principal sum and the then accrued interest shall become due and payable as provided in in said agreement of August 19th, 1874. And, further, if suit shall be instituted for the collection of said money or any portion thereof, that he, Goldsmith, will pay such attorney fee for instituting such suit and collecting such money, as the court may adjudge reasonable as attorney's fees in such suit, which sum may be added to the said principal sum and judgment, or decree may be taken therefor, and it shall become a part of the said principal debt payable in gold coin of the United States, and secured as said principal debt is by said trust deeds and the property therein described and conveyed to said Henry Hewett.

That nothing herein contained shall be so construed as to
18 prevent or prohibit said trustee from selling said land to him conveyed as provided in said agreement of August 19th, 1874, upon the default of the payment of said principal sum and interest, as herein above provided that the same shall be paid.

That said party of the third part agrees to extend the time of the payment of said principal sum of $96,750.00, and 2 per cent. thereon for a period of one year from the date hereof, or until default shall be made in the monthly payments of the interest as herein above specified and provided, and no longer; but if default shall be made in the monthly payments of interest as hereinabove provided, or of any such payments, then the whole of the said principal sum with interest thereon accrued at the time of such default, at the rate of one per cent per month, shall *become due and payable* in gold coin of the United States, *as in said note specified*, and the said property conveyed to said Hewett in trust and mentioned and referred to in said agreement of August 19th, 1874, and said property hereinabove described or referred to, shall be sold for the payment thereof *as by law and in said agreement provided*, and for the payment of such attorney fee as the court may adjudge reasonable in case suit shall be instituted.

It is distinctly understood and agreed by the parties hereto
19 that said sum of $96,750.00 and the interest to accrue thereon is and shall be payable only in gold coin of the United States, and that none of the security heretofore given, or now given by said Goldsmith and Teal to secure the payment of said note, is surrendered or forfeited. And, further, that the agreement of August 19th, 1874, is not annulled, vacated, or set aside by the execution of this

agreement, excepting in so far as the same may conflict with this agreement; in all other respects the two instruments are to be taken and construed together.

It is further understood and agreed that if the interest shall be promply paid upon the principal now due upon said note as hereinabove provided and agreed that said interest shall be paid, without default for the period of one year from the date hereof, so that the interest shall at that time all be paid, then the term for the payment of said note (the principal thereof) shall be extended upon the same terms and conditions for a period of another year, the security for the payment thereof remaining the same.

In witness whereof the said parties hereto set their hands and seals, the 18th day of October, 1876.

(Signed)	B. GOLDSMITH.	[L. S.]
"	HENRY HEWETT.	[L. S.]
"	JOSEPH TEAL.	[L. S.]
"	JAMES D. WALKER.	[L. S.]

20 That no part of the interest on said sum of $96,750 was paid after January 21st, 1877. That in April, 1877, said B. Goldsmith conveyed all of said lands (which it is hereinbefore alleged that he owned and conveyed to said Hewett) to defendant, and gave him possession thereof.

That on July 6, 1877, no part of said $96,750, or the interest after January 21st, 1877, having been paid, said Hewett demanded from defendant the possession of all said lands, in pursuance of the provisions of said contracts, and he refused to surrender the possession of any part of it, and he held possession of said south half of lots 2 and 7, in block 38, in the city of Portland, until the 30th day of November, 1878, and collected rents thereof and from the same amounting to two hundred dollars per month, during said period, which sum was the reasonable rental value thereof, and he held the possession of said undivided half of the north half of lot 6 and the undivided half of the south half of lot 7, in block 2, in the city of Portland, until the 30th day of November, 1878, and collected the rents thereof, amounting to eighty dollars per month, and said property was of the reasonable rental value of $80 per month, during said period.

21 That he held possession of said farms until November, 1879, and said undivided half of said farm in Linn county was of the reasonable rental value of $1,500 per year during said period, and said undivided half of said farm in Polk and Benton counties was of the reasonable rental value of $1500 per year during said period.

That by reason of defendant's refusal to surrender the possession of said lands to said Hewett, this plaintiff was obliged to and did institute a suit against defendant and others, to enforce the sale of said lands and to make his money out of the same, and in employ-

ing counsel and procuring a sale of said lands he was obliged to expend and pay out the sum of $3,600.

That if defendant had surrendered said lands and they had been sold by said Hewett under the agreement in said contracts, the expense of making the sales and the compensation of said Hewett would not have been more than $500.

That all the lands which plaintiff held as security for his said demands again said B. Goldsmith have been sold, either in accordance with the terms of said agreement or by decree of court, and the entire sale realized only $———, and said Goldsmith has not nor has he had since April, 1877, any other property out of which any part of plaintiff's demands could be made, and there is still justly due, owing, and unpaid upon said demand of plaintiff
22 against said B. Goldsmith over $50,000, and he has no ability to pay any part of it.

That by reason of defendant's refusal to surrender the possession of said property to said Hewett, this plaintiff has been damaged in the sum of $16,000.

Wherefore plaintiff prays judgment against defendant for $16,000 and his costs and disbursments of this action.

E. D. SHATTUCK & B. KILLIN,
Plaintiff's Attorneys.

UNITED STATES OF AMERICA, *District of Oregon,* } *ss:*

I, Henry Hewett. being first duly sworn, say that I am agent of the plaintiff and that the plaintiff is not within the district of Oregon, which is the reason I make this affidavit, and that the foregoing complaint is true as I verily believe.

HENRY HEWETT.

Subscribed and sworn to before me, this 5th day of August, 1880.

IRA O. SHATTUCK,
Notary Public for Oregon.

Endorsed as follows: Filed August 5th, 1880. R. H. Lamson, clerk. By P. Leonard, deputy clerk.

22¼ And afterwards, to wit, on the 5th day of August, 1880, there was issued out of said court a summons in this cause, in words and figures as follows, to wit:

22½ DISTRICT OF OREGON, *ss:*

In obedience to the command of the within writ, I have served the same upon the therein named Joseph Teal, by exhibiting same to him, and by delivering to him personally a true copy thereof, duly certified to by me as U. S. marshal of said district, together with a copy of the complaint in the within suit, duly cer-

tified to by B. Killin, one of pl'ff's attorneys, at Portland, in said district, on the 5th day of August, A. D. 1880.

EDWARD S. KEARNEY,
U. S. Marshal.
By W. S. WATERS, *Deputy.*

23 *Summons.*

In the Circuit Court of the United States for the Ninth Judicial Circuit, District of Oregon.

JAMES D. WALKER
vs.
JOSEPH TEAL. } No. 658. Summons.

The President of the United States to Joseph Teal, the above-named defendant, Greeting:

You are hereby commanded to be and appear in the above entitled court, holden at Portland, in said district, and answer the complaint filed against you in the above-entitled action, within ten days from the date of the service of this summons upon you, if served within the county of Multnomah, in said district, or if served within any other county of said district, then within twenty days from the date of such service upon you; and if you fail so to appear and answer, for want thereof the plaintiff will take judgment against you for $16,000.00 and his costs and disbursments of this action.

23¼ And this is to command you, the marshal of said district, or your deputy, to make due service and return of this summons. Hereof fail not.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, affixed at Portland, in said district, this 5th day of August, 1880.

[SEAL OF U. S. CIRCUIT COURT, OREGON.]

R. H. LAMSON, *Clerk*,
By P. LEONARD, *Deputy Clerk.*

[Endorsed:] No. 658. In the circuit court of the United States for the district of Oregon. James D. Walker *vs.* Joseph Teal. Summons. Returned and filed August 6, 1880. R. H. Lamson, clerk. By P. Leonard, deputy clerk.

23½ And afterwards, to wit, on the 17th day of August, 1880, there was duly filed in said court a demurrer in this cause, in words and figures as follows, to wit:

ing counsel and procuring a sale of said lands he was obliged to expend and pay out the sum of $3,600.

That if defendant had surrendered said lands and they had been sold by said Hewett under the agreement in said contracts, the expense of making the sales and the compensation of said Hewett would not have been more than $500.

That all the lands which plaintiff held as security for his said demands against said B. Goldsmith have been sold, either in accordance with the terms of said agreement or by decree of court, and the entire sale realized only $———, and said Goldsmith has not nor has he had since April, 1877, any other property out of which any part of plaintiff's demands could be made, and there is still justly due, owing, and unpaid upon said demand of plaintiff
22 against said B. Goldsmith over $50,000, and he has no ability to pay any part of it.

That by reason of defendant's refusal to surrender the possession of said property to said Hewett, this plaintiff has been damaged in the sum of $16,000.

Wherefore plaintiff prays judgment against defendant for $16,000 and his costs and disbursments of this action.

E. D. SHATTUCK & B. KILLIN,
Plaintiff's Attorneys.

UNITED STATES OF AMERICA, *District of Oregon,* } *ss:*

I, Henry Hewett, being first duly sworn, say that I am agent of the plaintiff and that the plaintiff is not within the district of Oregon, which is the reason I make this affidavit, and that the foregoing complaint is true as I verily believe.

HENRY HEWETT.

Subscribed and sworn to before me, this 5th day of August, 1880.

IRA O. SHATTUCK,
Notary Public for Oregon.

Endorsed as follows: Filed August 5th, 1880. R. H. Lamson, clerk. By P. Leonard, deputy clerk.

22¼ And afterwards, to wit, on the 5th day of August, 1880, there was issued out of said court a summons in this cause, in words and figures as follows, to wit:

22½ DISTRICT OF OREGON, *ss:*

In obedience to the command of the within writ, I have served the same upon the therein named Joseph Teal, by exhibiting same to him, and by delivering to him personally a true copy thereof, duly certified to by me as U. S. marshal of said district, together with a copy of the complaint in the within suit, duly cer-

tified to by B. Killin, one of pl'ff's attorneys, at Portland, in said district, on the 5th day of August, A. D. 1880.

EDWARD S. KEARNEY,
U. S. Marshal.
By W. S. WATERS, *Deputy.*

23 *Summons.*

In the Circuit Court of the United States for the Ninth Judicial Circuit, District of Oregon.

JAMES D. WALKER
vs.
JOSEPH TEAL.
} No. 658. Summons.

The President of the United States to Joseph Teal, the above-named defendant, Greeting:

You are hereby commanded to be and appear in the above entitled court, holden at Portland, in said district, and answer the complaint filed against you in the above-entitled action, within ten days from the date of the service of this summons upon you, if served within the county of Multnomah, in said district, or if served within any other county of said district, then within twenty days from the date of such service upon you; and if you fail so to appear and answer, for want thereof the plaintiff will take judgment against you for $16,000.00 and his costs and disbursments of this action.

23¼ And this is to command you, the marshal of said district, or your deputy, to make due service and return of this summons. Hereof fail not.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, affixed at Portland, in said district, this 5th day of August, 1880.

[SEAL OF U. S. CIRCUIT COURT, OREGON.]

R. H. LAMSON, *Clerk*,
By P. LEONARD, *Deputy Clerk.*

[Endorsed:] No. 658. In the circuit court of the United States for the district of Oregon. James D. Walker *vs.* Joseph Teal. Summons. Returned and filed August 6, 1880. R. H. Lamson, clerk. By P. Leonard, deputy clerk.

23½ And afterwards, to wit, on the 17th day of August, 1880, there was duly filed in said court a demurrer in this cause, in words and figures as follows, to wit:

24 *Demurrer*

In the Circuit Court of the United States for the District of Oregon.

JAMES D. WALKER, Pl'ff,
vs.
JOSEPH TEAL, Def't.

The defendant, Joseph Teal, by his att'y, W. Lair Hill, comes and demurs to the complaint in the above-entitled action, and for ground of demurrer says said complaint does not state facts sufficient to constitute a cause of action.

W. LAIR HILL,
Att'y for Def't.

Endorsed as follows: Filed August 17, 1880. R. H. Lamson, clerk. By P. Leonard, deputy clerk.

24½ And afterwards, to wit, on Monday, the 11th day of October, 1880, the same being the 6th judicial day of the regular October term of said court; Present: the Honorable Matthew P. Deady, United States district judge presiding, the following proceedings were had in said case, to wit:

25 *Order Setting Demurrer for Hearing.*

In the Circuit Court of the United States for the District of Oregon.

JAMES D. WALKER
vs.
JOSEPH TEAL. } No. 658. October 11, 1880.

Now, at this day, comes the plaintiff by Mr. Benton Killin, of counsel, and on his motion: It is ordered that this cause be, and it hereby is, set for hearing on the demurrer to the complaint herein, on Monday, October 18, 1880.

25½ And afterwards, to wit, on Monday, the 18th day of October, 1880, the same being the 9th judicial day of the regular October term of said court; Present: the Honorable Matthew P. Deady, United States district judge presiding, the following proceedings were had in said case, to wit:

26 *Order Setting Demurrer for Hearing, October* 19, 1880.

In the Circuit Court of the United States for the District of Oregon.

JAMES D. WALKER
vs.
JOSEPH TEAL. } No. 658. October 18, 1880.

Now, at this day, comes the plaintiff by Mr. Benton Killin, of counsel, and the defendant by Mr. H. Y. Thompson, of counsel, and by agreement of parties: It is ordered that this cause be, and it is hereby set, for hearing on the demurrer to the complaint herein, on Tuesday, October 19, 1880.

26½ And afterwards, to wit, on Wednesday, the 20th day of October, 1880, the same being the 10th judicial day of the regular October term of said court; Present: the Honorable Matthew P. Deady, United States district judge, presiding, the following proceedings were had in said case, to wit:

27 *Demurrer taken under Advisement.*

In the Circuit Court of the United States for the District of Oregon.

JAMES D. WALKER *vs.* JOSEPH TEAL. } No. 658. October 20, 1880.

Now, at this day, comes the plaintiff by Mr. Benton Killin, of counsel, and the defendant by Mr. H. Y. Thompson, of counsel, and this cause comes on to be heard on the demurrer to the complaint herein is argued by counsel and submitted to the court, who will advise thereof.

27½ And afterwards, to wit, on Monday, the 10th day of January, 1881, the same being the 48th judicial day of the regular October term of said court; Present: the Honorable Matthew P. Deady, United States district judge, presiding, the following proceedings were had in said case, to wit:

28 *Order overruling Demurrer.*

In the Circuit Court of the United States for the District of Oregon.

JAMES D. WALKER *vs.* JOSEPH TEAL. } No. 658. January 10, 1881.

Now, at this day, the court being sufficiently advised upon the demurrer to the complaint herein: It is ordered that said demurrer be, and the same is hereby, overruled, with leave to defendant to answer within twenty days.

28½ And afterwards, to wit, on the 10th day of January, 1881, there was issued out of said court an opinion by Judge Deady, in this cause, in words and figures, as follows, to wit:

29 *Opinion by Judge Deady.*

In the Circuit Court of the United States for the District of Oregon.

MONDAY, *January* 10, 1881.

JAMES D. WALKER *vs.* JOSEPH TEAL. } No. 658. Action at law to recover damages.

(1.) CONDITIONAL LIMITATION—DEMAND OF POSSESSION IN CASE OF CO-TENANTS.—G. conveyed an undivided interest in certain real

property to H. in trust to secure the payment of a loan from W., with an agreement that G. might remain in possession and take the rents and profits without account, until the note given for the loan was overdue and unpaid, in which case the trustee was to take possession and dispose of the property to satisfy the debt, and G. was to surrender the possession for this purpose on demand; the note became overdue and remained unpaid, and G. conveyed his interests in the premises to his co-tenant T., and gave him possession, when H. demanded such possession from T., who refused unqualifiedly, and continued to occupy the property and received the rents and profits thereof until the same was sold at a judicial sale, at the suit of H., for less than two-thirds of the loan and interest. Held—

(*a.*) That the interest which G. had in the property, in case the debt was not duly paid, was not an estate upon condition which was not avoided until a demand for possession, but an estate upon a conditional limitation which terminated with the happening of the contingency—the note becoming overdue and remaining unpaid—without any demand.

(*b.*) That the demand for possession required by the agreement was, under the circumstances, not a demand for the purpose of avoiding an estate, and therefore insufficient, unless made exactly for that which the trustee was entitled—nothing more nor less—but was the equivalent of a mere notice to quit by a landlord upon a tenant at will, and was sufficient, although in form it may have included the exclusive possession of the whole property—the refusal being in effect a denial of the trustee's right to the possession, even as a co-tenant.

(*c.*) The trustee being entitled as co-tenant with T. to the possession of the whole property, and the demand having been made by him for possession in pursuance of the agreement, it is to be construed and understood as a demand for possession as such co-tenant, and therefore it was not larger than the right of the party making it, and is sufficient, even if it was to have the effect of avoiding an estate.

(2.) CONSTRUCTION OF DIRECTION TO TRUSTEE TO SELL.—A conveyance in trust to secure the payment of a loan is made primarily for the benefit of the lender, and should be construed, so far as it is open to construction, so as to affect the object for which it is made; and therefore, where such a conveyance provided that upon default in the payment of the loan the trustee should take possession and sell the property upon thirty days' notice: Held, that the authority to sell was for the benefit of the lender, and the trustee was not bound to sell until he thought best for the payment of the loan, or was directed to do so by a court of equity, and in the meantime it was his duty to apply the rents and profits upon the debt.

DEADY, J.: The plaintiff, a British subject, brings this action to recover $16,000 damages, alleged to have been sustained by him on

account of the refusal of the defendant, a citizen of Oregon, to deliver to him the possession of certain real property in Oregon, and wrongfully withholding the same from the plaintiff from July 6, 1877, to November 30, 1878, to wit, the south half of lots 2 and 7, in block 38, and the undivided half of the north half of lot 6, and the undivided half of the south half of lot 7, in block 2, in the city of Portland, from which the defendant received rents during said period at the rate of $280 per month, or $4,704 in the aggregate; the undivided half of a certain farm situated in Lane county, and known as the Teal and Goldsmith farm therein, and the undivided half of a certain farm situated in Polk and Benton counties, and known as the Teal and Goldsmith farm therein, the reasonable rental value of which, during said period, was $2,000 a year, or $2,800 in the aggregate; and also on account of the expense incurred by the plaintiff in instituting and maintaining legal proceedings to enforce the sale of said lands over and above what it would have cost to dispose of the same if the defendant had surrendered the possession thereof to the plaintiff, as he was legally bound to do, $3,100, together with interest.

The defendant demurs to the complaint upon the ground that it does not state facts sufficient to constitute a cause of action.

The facts stated in the complaint necessary to an understanding of the question made in the argument upon the demurrer are these:

On August 19, 1874, the defendant, Joseph Teal, and Bernard Goldsmith, being the joint owners and tenants in common of the farms aforesaid, conveyed the sume to Henry Hewett by a conveyance absolute in form, but, as set forth in a contemporaneous declaration and agreement signed by the plaintiff and defendant and said Hewett and Goldsmith, to be held by him in trust as a security for the payment of a note then made by said Goldsmith for the sum of $100,000, and made payable to plaintiff, or order, two years after date, with interest at one per centum per month, payable monthly, with a stipulation that if default was made in the payment of the interest for the period of twenty days the whole sum of the note should, at the option of the holder thereof, become due and payable at once.

By the declaration of trust it was stipulated and provided: (1) That Hewett held the legal title to the property, subject to the right of Teal and Goldsmith to retain possession of the same, and to take and have, without account, the issues and profits thereof—they paying all taxes and public charges imposed thereon—until said note should become due and remain unpaid thirty days; (2) that if such default is made in the payment of said note, Goldsmith and Teal "will and shall, on demand, peacefully surrender to said Hewett" the possession of said property, who "may and shall proceed and take possession" of the same, "and on thirty days' notice in writing to said Teal and Goldsmith * * * requiring them to pay said debt, * * * and on their failure so to pay, shall sell

the same at public auction on not more than thirty days' notice," or sufficient thereof to pay the debt and charges.

On August 18, 1876, there was due upon said note the sum of $96,750, when, at the instance of said Goldsmith, it was agreed between the plaintiff and defendant and Hewett and Goldsmith that the time of payment thereof should be extended one year, but upon the stipulation as aforesaid, that if default was made in the payment of the principal or interest the whole sum should " become due and payable as provided in said agreement of August 19, 1874;" and the said Goldsmith, in consideration of such extension, then conveyed to said Hewett the lots aforesaid by a conveyance absolute in form, but, as set forth in said agreement of August 18, 1876, to be held by him as an additional security for the payment of the note aforesaid, and in the manner and for the purposes mentioned in the agreement of August 19, 1874, which agreement was not to be thereby annulled or set aside except so far as the latter might conflict with the former, but the two agreements were " to be taken and construed together."

In April, 1877, Goldsmith made a conveyance of all the property which he had conveyed to Hewett, as aforesaid, to the defendant Teal, and gave him possession thereof.

On July 6, 1877, no part of said principal having been paid nor any of the interest arising thereon after January 21, 1877, " Hewett demanded from the defendant the possession of all said lands in pursuance of the provisions of said contracts," but the latter refused to surrender " any part" of the same and held possession thereof until November 30, 1878, and received the rents and profits therefrom during said period.

All the lands aforesaid have been sold, either at private or judicial sale, and the proceeds applied upon the plaintff's debt, but there is still due thereon from said Goldsmith over $50,000, and since April, 1877, he has not had any other property out of which any part thereof could be made.

Upon the argument of the demurrer it was finally admitted by counsel for the defendant that the plaintiff was entitled to the possession of the property from and after the default was made in the payment of said note—January 21, 1877—provided there was a sufficient demand therefor, and to recover in this action such damages as he may have sustained by reason of the defendant's refusal to surrender the same. But it is contended that the demand, being for the whole property, while the conveyance by Goldsmith to Hewett, except as to the south half of lots 2 and 7, in block 38 aforesaid, only included an undivided half thereof, was too large and therefore insufficient, citing Hodgeboom *v.* Hall, 24 Ward, 148, and Bradstreet *v.* Clark, 21 Pick., 393.

Admitting, for the present, that the demand made by Hewett was larger than his right, are the cases cited to show that it is insufficient parallel with the one at bar? In the case of Hodgeboom *vs.* Hall, *supra*, there was a devise of an estate to a son,

upon condition that he would support his two sisters. The latter, assuming that the condition had been broken and the estate forfeited, brought an action to recover possession of their interest in the property as heirs of the devisor, but the court held, upon the facts, that there was no satisfactory evidence of any demand and refusal of support, and therefore it did not appear that the condition was broken. Here, however, there was a formal demand and refusal, but it is objected that it included more than the party was entitled to. In Bradstreet *vs.* Clark, *supra*, an estate was devised, upon condition that the devisee pay the legacies given by the will to the children of the devisor. Afterwards the legatees brought an action to recover the possession of the property, upon the ground that the estate of the devisee was forfeited by a refusal on the part of his grantee to pay the legacy of $10 due one of them. On the trial it appeared, from the evidence, that the demand was made for the three legacies, two of which had been paid by the devisee, and the court held that the demand, although sufficient to support an action to enforce the payment of the legacy, was not sufficient to avoid the estate, likening it to the case of a leasehold estate held upon the condition of paying rent, which is not forfeited by non-payment unless there is also a demand of the precise sum due—not a penny more nor less.

The legal title to this property was in Hewett for the benefit of the plaintiff, and he was therefore entitled to the possession and the pernancy of the profits from the date of the conveyances to him but for the stipulation in the declaration of trust that Goldsmith might have the possession and profits so long as he was not in default upon his note. In effect, the plaintiff having loaned Goldsmith $100,000, and the latter having conveyed this property to Hewett to secure the payment of that sum with interest, the parties agreed that instead of the trustee taking possession of the property at once, and applying the rents in payment of the interest accruing upon the loan, Goldsmith might remain in possession while he paid the interest. The only interest or estate, then, which the defendant had in this property at the time of the demand, as the assignee of Goldsmith, was the possession so long as the latter duly paid the interest accruing upon his note and no longer.

This, then, was not an estate upon condition, and therefore it was not necessary that there should have been either an entry or claim (demand) to avoid the estate, upon the breach of the condition, but it was an estate upon a conditional limitation—an agreement for the possession so long as the interest was paid—a possession limited by that contingency, and as soon as it happened the estate terminated and the right to the possession ceased without any entry or demand upon the part of the plaintiff or his trustee.

The illustration given by Blackstone is in point: "When land is granted to a man so long as he is parson of Dale, or while he continues unmarried, or until out of the rents and profits he shall have

made £500 and the like. In such case the estate determines (ceases) as soon as the contingency happens." 2 Black., 155; The 50 Associates *vs.* Howland, 11 Met., 101; Wash. R. P., 319.

The conveyance to Hewett, and the stipulation concerning his right to the possession upon the failure to pay the note, having been made for the benefit of the plaintiff, in consideration of and as a security for the repayment of the money advanced by him to Goldsmith, they ought to be construed, so far as they are open to construction, favorably to the former, and with a view to effect the object for which they were made.

Goldsmith's right to the possession terminated by his own act—his failure to pay the interest upon his note. Between that time and the demand by Hewett, he or his assignee was a mere tenant at will or by sufferance, and the demand of the possession was only necessary on account of the contract to that effect, and to enable the trustee to maintain an action for the same in case it was refused. In effect, the demand required by the agreement was a mere notice to quit to a tenant holding over after the expiration of his lease or without it.

which he therefore, no good reason for applying in this case the Teal, and ometimes absurdly nice rule of the common law touching

On Jul and effect of a demand, which may have the effect to avoid, forfeit, an estate of great value for the non-payment of a comparatively trivial sum as rent or a legacy.

There could be no forfeiture in this case—the defendant had nothing to forfeit. Having failed to comply with the terms upon which he was allowed to remain in possession of the property, his right thereto was already gone, and by the demand he was only required to surrender the possession to the party entitled, and even that only for the purpose of applying the profits upon his debt.

On the contrary, the rule applicable to this demand is the one which governs in the case of an ordinary demand for the possession of property to which the party upon whom it is made has no longer any right; and if it happens that more is demanded than the party is entitled to, it is a good demand so far as he is entitled, if the refusal is absolute and goes to the whole demand.

Nor do I think that this demand was even too large. It is described in the complaint as a demand for "the possession of all said lands in pursuance of the provisions of said contracts," and it is alleged that the defendant refused to "surrender the possession of any part" of them.

The defendant, as to Goldsmith's interest in the property, stands in his shoes, and had no right as against the trustee or the plaintiff, that Goldsmith did not have. He took his conveyance with knowledge that the legal title was in the trustee, and that default had been made in the payment of interest, and therefore took nothing by it but Goldsmith's right to the possession, which was then reduced to the minimum—the will of the trustee.

As to lots 2 and 7 aforesaid, there is no question about the suffi-

defendant shall answer herein is hereby extended until the 5th day of March, 1881.

SHATTUCK & KILLIN,
Plaintiffs' Attorneys.
GEO. H. DURHAM,
Of Atty's for Def't.

[Endorsed:] Filed March 5, 1881. R. H. Lamson, clerk.

34½ And afterwards, to wit, on the 5th day of March, 1881, there was duly filed in said court, an answer in this cause, in words and figures as follows, to wit:

35 *Answer.*

In the Circuit Court of the United States for the District of Oregon.

JAMES D. WALKER, plaintiff,
vs.
JOSEPH TEAL, defendant.

The defendant answering the complaint in the above-entitled action, denies that on the 6th day of July, 1877, or at any time, the said Henry Hewett, or any one demanded from the defendant the possession of the said undivided half of the said lands, in pursuance of the provisions of said contracts or otherwise, and denies that the defendant refused to surrender the possession of said lands or any part thereof, to the said Hewett, or to any one.

The defendant denies that he collected rents for the said undivided half of the north half of lot 6, and the undivided half of the south half of lot 7, in block No. 2, in the city of Portland, amounting to $80 per month, or any other or greater sum than $75 per month during the time which said premises were rented. But the defendant avers that during the time mentioned in the complaint, the said premises were not at all times rented, and could
36 not be, and he avers that the reasonable rental value of said premises during said term, was not to exceed the sum of $70 per month.

Defendant denies that the said undivided half of the said farm in Linn county, was of the reasonable rental value of $1,500 per year, or any other or greater sum than $256.20 per year.

The defendant denies that the said undivided half of the said farm in Polk and Benton counties, was of the reasonable rental value of $500.00, or any other sum whatever.

The defendant alleges that during the time mentioned in the complaint, he expended for necessary improvements and taxes upon the said north ½ of lot 6, and the said south half of lot 7, in block No. 2, the sum of $409.28.

That during said time the defendant expended and paid out for necessary repairs and improvements upon said Linn county farm, and for taxes thereon, the sum of $8,000.00.

smith's only interest in the property was the right to redeem it by the payment of the loan. He had received the plaintiff's money and in effect conveyed his property to the trustee in payment thereof, so far as it might suffice, subject to his right to redeem the same by the payment of the loan.

The object of the trust was to enable the plaintiff to make his money out of the property in case Goldsmith should prove personally unable to pay, as the result was, and therefore its provisions are to be construed and applied with a view to that end. Now, while the trustee could not sell unless after 30 days' notice to Goldsmith to pay, and upon 30 other days' notice of such sale, yet he was not bound to sell until he thought best, or it may be until he was required to do so by the direction of a court of equity. It was his right and duty to take possession of the property and keep, manage, and dispose of it so as to best conserve and promote the interest of the plaintiff, and neither Goldsmith nor the defendant as his assignee had any right to impede or control him in the exercise of this power, so long as he kept within the terms of the trust.

For instance it is admitted that the trustee had a right to take possession of this property and to sell it. But certainly it could not have been contemplated by the parties, that he was absolutely bound to sell in 60 days after taking possession without any reference to the state of the market or what it would bring. As and when it was sold, the proceeds do not appear to have paid more than two-thirds of the debt; whereas if the trustee had been admitted into possession, he might have applied the rents and profits on the interest and ultimately paid the whole debt by a favorable disposition of the property. However this may be, the person directly and primarily interested in the matter was the plaintiff, and the agreement ought to be construed so as to allow him to exercise his judgment whether to hold the property or sell it. The debtor could always protect himself against any abuse of this discretion, to his prejudice, by paying the debt and redeeming the property or by the interference of a court of equity.

As to the claim for damages on account of the plaintiff's being compelled by reason of the defendant's refusal to surrender the possession, to bring and maintain a suit in equity to procure a sale of the property, it was not argued by counsel, and need not now be considered.

It at least appears from the complaint that the plaintiff is entitled to recover damages for withholding the possession of the property during the period alleged, and therefore the complaint states a cause of action.

The demurrer is overruled.

Benton Killin, for the plaintiff.

W. Lair Hill & H. Y. Thompson, for the defendant.

(Signed) MATTHEW P. DEADY,
U. S. District Judge, Oregon.

Endorsed as follows: Filed January 10, 1881. R. H. Lamson, clerk.

31½ And afterwards, to wit, on Monday the 7th day of February, 1881, the same being the 60th judicial day of the regular October term of said court, present, the Honorable Mathew P. Deady, United States district judge, presiding, the following proceedings were had in said case, to wit:

32 *Order Extending Time to Answer.*

In the Circuit Court of the United States, for the District of Oregon.

JAMES D. WALKER
vs.
JOSEPH TEAL. } No. 658. February 7, 1881.

Now at this day comes the plaintiff by Mr. E. D. Shattuck, of counsel, and the defendant by Mr. George H. Durham, of counsel, and by agreement of counsel it is ordered that the time heretofore allowed defendant to answer be and the same is hereby extended ten days.

32½ And afterwards, to wit, on Monday, the 14th day of February, 1881, the same being the 63d judicial day of the regular October term of said court. Present, the Honorable Matthew P. Deady, United States district judge presiding, the following proceedings were had in said case, to wit:

33 *Order Giving Further Time to Answer.*

In the Circuit Court of the United States, for the District of Oregon.

JAMES D. WALKER
vs.
JOSEPH TEAL. } No. 658. February 14, 1881.

Now at this day, on motion of Mr. H. Y. Thompson, of counsel for defendant, it is ordered that defendant have till Wednesday, February 21, 1881, to answer herein.

33½ And afterwards, to wit, on the 5th day of March, 1881, there was duly filed in said court a stipulation extending time to answer, in words and figures as follows, to wit:

34 *Stipulation Extending Time to Answer.*

In the Circuit Court of the United States, for the District of Oregon.

JAMES D. WAKKER
vs.
JOSEPH TEAL.

It is hereby stipulated and agreed that the time within which the

defendant shall answer herein is hereby extended until the 5th day of March, 1881.

SHATTUCK & KILLIN,
Plaintiffs' Attorneys.
GEO. H. DURHAM,
Of Atty's for Def't.

[Endorsed:] Filed March 5, 1881. R. H. Lamson, clerk.

34½ And afterwards, to wit, on the 5th day of March, 1881, there was duly filed in said court, an answer in this cause, in words and figures as follows, to wit:

35 *Answer.*

In the Circuit Court of the United States for the District of Oregon.

JAMES D. WALKER, plaintiff,
vs.
JOSEPH TEAL, defendant.

The defendant answering the complaint in the above-entitled action, denies that on the 6th day of July, 1877, or at any time, the said Henry Hewett, or any one demanded from the defendant the possession of the said undivided half of the said lands, in pursuance of the provisions of said contracts or otherwise, and denies that the defendant refused to surrender the possession of said lands or any part thereof, to the said Hewett, or to any one.

The defendant denies that he collected rents for the said undivided half of the north half of lot 6, and the undivided half of the south half of lot 7, in block No. 2, in the city of Portland, amounting to $80 per month, or any other or greater sum than $75 per month during the time which said premises were rented. But the defendant avers that during the time mentioned in the complaint, the said premises were not at all times rented, and could
36 not be, and he avers that the reasonable rental value of said premises during said term, was not to exceed the sum of $70 per month.

Defendant denies that the said undivided half of the said farm in Linn county, was of the reasonable rental value of $1,500 per year, or any other or greater sum than $256.20 per year.

The defendant denies that the said undivided half of the said farm in Polk and Benton counties, was of the reasonable rental value of $500.00, or any other sum whatever.

The defendant alleges that during the time mentioned in the complaint, he expended for necessary improvements and taxes upon the said north ½ of lot 6, and the said south half of lot 7, in block No. 2, the sum of $409.28.

That during said time the defendant expended and paid out for necessary repairs and improvements upon said Linn county farm, and for taxes thereon, the sum of $8,000.00.

That during said time, the defendant paid taxes upon said Polk county farm, amounting to $200.00, and upon that part of said lands lying in Benton county, the sum of $200.00.

That the one-half of each of the said items of necessary
37 expenses and taxes is due and owing from the plaintiff to this defendant, and the pl'ff refuses to pay the same, although demanded so to do.

The defendant further avers that during the said times mentioned in the complaint, the defendant has devoted his time to caring for and managing the said lands described in the complaint, and that the reasonable value of such services so rendered was and is the sum of six thousand dollars, the one-half of which is due from the plaintiff to this defendant, and the pl'ff refuses to pay the same although demanded so to do. The defendant denies that by reason of the defendant's refusal to surrender the possession of said lands to said Hewitt, or to any one, the pl'ff was obliged to institute a suit against the defendant, or any one, to enforce the sale of said lands, or for any purpose. And defendant denies that pl'ff was obliged to or did to the knowledge of this defendant pay out the sum of $3,600.00, or any sum, in employing counsel to procure a sale of said lands. But on the contrary, the defendant avers that he never at any time made any defense against the claim of right to sell the said half of said lands, which belonged to said Goldsmith, and it never was necessary for the defendant to institute any action, suit, or proceeding therefor, or to employ attorneys for that purpose.

38 Defendant denies that by reason of the defendant's refusal to surrender the possession of the said lands to the said Hewett the plaintiff has been damaged in the sum of $16,000, or any other sum. But the defendant avers that by reason of the premises the pl'ff is indebted to the def't in the sum of three thousand five hundred dollars, and for interest thereon from Nov. 1, 1879, and the defendant prays judgment therefor as well as for his costs and disbursements in this action.

DURHAM AND THOMPSON,
Atty's for Def't.

STATE OF OREGON, *County of Multnomah.*

I, Joseph Teal, being duly sworn, say I am the defendant above named, and that the foregoing answer is true as I verily believe.

JOSEPH TEAL.

Subscribed and sworn to before me, the 5th day of March, 1881.

[NOTARIAL SEAL.] H. Y. THOMPSON,
Notary Public.

Endorsed: Filed March 5, 1881. R. H. Lamson, clerk.

38½ And afterwards, to wit, on the 9th day of March, 1881, there was duly filed in said court a reply in this cause, in words and figures as follows, to wit:

39 *Reply.*

In the Circuit Court of the United States for the District of Oregon.

JAMES D. WALKER, Plaintiff,
vs.
JOSEPH TEAL, Defendant.

The plaintiff replies to the answer herein and alleges that he has not any knowledge or information sufficient to form a belief as to whether defendant during the times mentioned in the complaint expended for necessary improvements and taxes, or either of them, upon said north half of lot 6, and the said south half of lot 7, in block 2, the sum of $409.28, or any part thereof.

And the plaintiff alleges that he has not any knowledge or information sufficient to form a belief as to whether during said time defended expended for necessary repairs and improvements, or either of them upon said 2 and 7, in block 38, the sum of $68.75 or any sum. And plaintiff alleges that he has not any knowledge or information sufficient to form a belief as to whether during said time the defendant expended, or paid out for necessary repairs or improvements and taxes thereon, or for either repairs, im-
40 provements, or taxes, or any of them, on said Linn county farm the sum of $8,000.00, or any sum whatever.

And he alleges that he has not any knowledge or information sufficient to form a belief as to whether during said time the defendant paid taxes upon said Polk county farm amounting to $200, or any sum, or as to whether during said time he paid taxes upon said lands lying in Benton county amounting to $200, or any sum.

Denies that one half of each or any of said items of necessary expenses and taxes, or any part of either of said items is due from plaintiff to defendant.

Denies that any demand has been made upon him for any of said taxes or expenses. And he alleges that he has not any knowledge or information sufficient to form a belief as to whether during said time mentioned in the complaint, or for any part of it, defendant devoted his time in caring for or managing the said lands described in the complaint, or any of them, or whether the reasonable valu of such service so rendered was or is the sum of $6,000 or any sum.

Denies that one-half or any part of said sum is due from plaintiff to defendant.

41 Denies that demand has been made upon him for said sum or any part of it.

Denies that it never was necessary for plaintiff to institute any action, suit or proceeding to foreclose his lien upon said la[illegible]ds, or to employ attorneys for that purpose.

Denies that by reason of the premises the plaintiff is indebted [illegible] to the defendant in the sum of $3,500, or any part of it, or for interest thereon, or on any part of it, since November 1st, 1879, or any [illegible] of said time.

Wherefore plaintiff *plaintiff* prays as in his complaint.

E. D. SHATTUCK & B. KILLIN,
Attorneys for Plaintiff.

DISTRICT OF OREGON, *ss:*

Henry Hewett, being duly sworn, says that plaintiff is not within the State of Oregon; that I am his agent, and the foregoing reply is true, as I verily believe.

HENRY HEWETT.

Subscribed and sworn to before me, this 9th day of March, A. D. 1881.

[NOTARIAL SEAL.] D. P. KENNEDY,
Notary Public for Oregon.

Endorsed: Filed March 9, 1881. R. H. Lamson, clerk.

41½ And afterwards, to wit, on the 28th day of March, 1881, there was duly filed in said court a notice to set case upon docket for trial, in words and figures following, to wit:

42 *Notice to set Cause upon Docket for Trial.*

In the Circuit Court of the United States for the District of Oregon.

JAMES D. WALKER, Plaintiff,
vs.
JOSEPH TEAL, Defendant.

To Defendant and Messrs. Durham and Thompson, his attorneys:

On the 28th day of March, 1881, the plaintiff will apply to the above-entitled court to set this case and put it upon the docket for trial.

E. D. SHATTUCK & B. KILLIN,
Plaintiff's Attorneys.

Service of the within notice acknowledged this 21st day of March, A. D. 1881.

G. H. DURHAM,
Of Deft's Att'ys.

Endorsed: Filed March 28, 1881. R. H. Lamson, clerk.

42½ And afterwards, to wit, on Monday, the 28th day of March, 1881, the same being the 92d judicial day of the regular October term of said court—Present, the honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

43 *Order setting Cause for Trial when Jury shall be present.*

In the Circuit Court of the United States for the District of Oregon.

JAMES D. WALKER
vs.
JOSEPH TEAL. } No. 658. March 28, 1881.

Now at this day, on motion of Mr. E. D. Shattuck, of counsel for plaintiff, it is ordered that this cause be, and the same is hereby, set for trial when a jury shall be present in this court.

43½ And afterwards, to wit, on Friday, the 29th day of April, 1881, the same being the 11th judicial day of the regular April term of said court—Present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

44 *Order Setting Cause for Trial, June* 6, 1881.

In the Circuit Court of the United States for the District of Oregon.

JAMES D. WALKER
vs.
JOSEPH TEAL. } No. 658. April 29, 1881.

Now, at this day, on motion of Mr. B. Killin, of counsel for plaintiff, it is ordered that this cause be, and the same is hereby, set for trial on Monday, June 6, 1881.

44½ And afterwards, to wit, on the 7th day of June, 1881, there was duly filed in said court an affidavit of H. Y. Thompson, in this cause, in words and figures as follows, to wit:

45 *Affidavit of H. Y. Thompson.*

In the Circuit Court of the United States for the District of Oregon.

JAMEL D. WALKER, Pl'ff,
vs.
JOSEPH TEAL, Def't.

DISTRICT OF OREGON, *ss:*

I, H. Y. Thompson, being first sworn, say on my oath that I am one of the attorneys of the defendant, Joseph Teal, in the above-entitled action, and that I drew the answer now on file in said action. That my instructions were to make in said answer a full and complete denial of the demand alleged in the complaint to have been made for the possession of the lands conveyed by B. Goldsmith to the defendant, and of every parcel thereof, and that in drawing said answer I intended to make such denial as to every parcel of said lands, and thought the answer did contain such denial, until my attention was called, on the evening of June 6, 1881, to the omission, in said answer, of any denial of such demand as to the lands de-

scribed in the complaint as the south half of lots No. 2 and 7, in block No. 38, in the city of Portland, but which description in the complaint I suppose to be an error of the plaintiff's att'y,
46 and to be intended for the south half of lots 2 and 7, in block No. 39. That the omission of such denial was wholly accidental and unintentional, and that an application would have been made for leave to amend said answer by making such denial as to each and every parcel of said lands had the omission been discovered at an earlier stage of the case.

H. Y. THOMPSON.

Subscibed and sworn to before me, this June 7, 1881.
R. H. LAMSON, *Clerk.*

Endorsed as follows: Filed June 7, 1881. R. H. Lamson, clerk.

46½ And afterwards, to wit, on Wednesday, the 8th day of June, 1881, the same being the 31st judicial day of the regular April term of said court—Present, the Honorable Matthew P. Deady, United States district judge presiding—the following proceedings were had in said case, to wit:

47 *Order allowing parties to Change No. of Blocks in Complt. and Answer.*

In the Circuit Court of the United States for the District of Oregon.

JAMES D. WALKER
vs.
JOSEPH TEAL. } No. 658. June 8, 1881.

Now, at this day, comes the plaintiff, by Mr. Benton Killin, of counsel, and the defendant, by Mr. H. Y. Thompsom, of counsel, and on motion of said defendant it is ordered that both the plaintiff and the defendant be, and they are hereby, allowed to change the number of the block in the complaint and answer mentioned from thirty-eight to thirty-nine.

47½ And afterwards, to wit, on the 8th day of June, 1881, there was duly filed in said court a motion for leave to file amended answer herein, in words and figures as follows, to wit:

48 *Motion for Leave to File Amended Answer.*

In the Circuit Court of the United States for the District of Oregon.

JAMES D. WALKER, plff.,
vs.
JOSEPH TEAL, deft.

The defendant moves the court, on the pleadings and the affida-

vit of H. Y. Thompson, herewith presented for leave to file the amended answer herewith submitted to the court.

W. LAIR HILL,
H. T. BINGHAM,
DURHAM & THOMPSON,
Attys. for Deft.

Endorsed: Filed June 8, 1881. R. H. Lamson, clerk.

48½ And afterwards, to wit, on Wednesday, the 8th day of June, 1881, the same being the 31st judicial day of the regular April term of said court—Present, the Honorable Matthew P. Deady, United States district judge presiding—the following proceedings were had in said case, to wit:

49 *Order Setting Time for Hearing Application to File an Amended Answer.*

In the Circuit Court of the United States for the District of Oregon.

JAMES D. WALKER, plff.,
vs.
JOSEH TEAL, Deft. } No. 658. June 8, 1881.

Comes now the defendant, by Mr. Geo. H. Durham, one of his attorneys, and moves the court, upon the pleadings and the affidavit of H. Y. Thompson, for leave to file an amended answer in this action, which amended answer is submitted to the court; and it is ordered that said application be heard, on the 9th day of June, 1881, at the time of ½ past 9 o'clock in the forenoon, and that the defendant cause notice of the motion and of this order, together with a copy of the said amended answer, of the said affidavit, and of this order, to be served upon the attorney of the plaintiff to-day.

(Signed) DEADY, J.

Endorsed as follows: Fled June 8, 1881. R. H. Lamson, clerk.

49½ And afterwards to wit, on the 9th day of June, 1881, there was duly filed in said court a notice of application for leave to file amended answer and proof of service of notice, in words and figures as follows, to wit:

50 *Notice of Application for Leave to File Amended Answer.*

In the Circuit Court of the United States for the District of Oregon.

JAMES D. WALKER, Plff.
vs.
JOSEPH TEAL, Def't.

To James D. Walker, plaintiff, and his attorneys:

Take notice that the defendant has applied to the court for leave to file in the above-entitled action, the amended answer, a copy of which is herewith delivered to you, and that said application will

be heard on the 9th day of June, 1881, at the hour of 9½ o'clock in the forenoon, in accordance with an order of the court setting the same for hearing at that time, a copy of which order is herewith delivered to you. The application is made upon the affidavit, a copy of which is herewith delivered to you, and upon the said amended answer, and the pleadings on file.

W. LAIR HILL, H. T. BINGHAM,
& DURHAM & THOMPSON,
Att'ys for Def't.

51 In the Circuit Court of the United States for the District of Oregon.

JAMES D. WALKER
vs.
JOS. TEAL.

DISTRICT OF OREGON, *ss:*

I, G. H. Durham, being duly sworn, say I am one of the att'ys for def't herein; that I served the papers named in the annexed order, to wit: said order, affidavit of H. Y. Thompson, notice of application for leave to file amended answer, and said amended answer, upon Benton Killin, att'y of pl'ff, in his office in said district, between the hours of 2 and 3 o'clock p. m., of this, the 8th day of June, 1881, by leaving duly certified copies of each and all said papers within his office, with his clerk, Mr. Kennedy; neither he, the said B. Killin, nor his law partner, E. T. Shattuck, being found in his office at that time.

G. H. DURHAM.

Subscribed and sworn to before me, June 8th, 1881.
[NOTARIAL SEAL.] H. T. BINGHAM.
Notary Public for Oregon.

Endorsed as follows: Filed June 9, 1881. R. H. Lamson, clerk. By P. Leonard, deputy clerk.

51½ And afterwards, to wit, on Thursday, the 9th day of June, 1881, the same being the 32d judicial day of the regular April term of said court—Present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

52 *Order denying motion for leave to file Amended Answer—Jury.*

In the Circuit Court of the United States for the District of Oregon.

JAMES D. WALKER
vs.
JOSEPH TEAL. } No. 658. June 9, 1881.

Now at this day come the plaintiff, by Mr. Benton Killin, of

counsel, and the defendant, by Mr. W. Lair Hill and Mr. H. T. Bingham, of counsel, and thereupon said defendant moves the court for leave to file an amended answer herein; and the court having heard the argument of counsel, and duly considered the same, it is ordered that said motion be, and the same is hereby, denied. And now comes the following jury, viz: W. H. Vaughan, Sewell R. Hawley, P. W. Prather, Fedde Carstens, R. C. Clark, David M. Guthrie, Ulysses Jackson, Elijah T. Miller, Paris McCain, Hynson Smyth, Martin Scrafford, and William Jones, twelve good and lawful men of the district, accepted by the parties, who are duly empaneled and sworn to well and truly try the issue joined and a true verdict give according to the law and evidence. And the hour of five o'clock p. m. having arrived, court adjourned.

52½ And afterwards, to wit, on Friday, the 10th day of June, 1881, the same being the 33d judicial day of the regular April term of said court—Present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

53 *Findings of Jury.*

In the Circuit Court of the United States for the District of Oregon.

JAMES D. WALKER *vs.* JOSEPH TEAL. } No. 658. June 10, 1881.

Now at this day comes the plaintiff, by Mr. Benton Killin, of counsel, and the jury being present and answering to their names, the trial of this cause is proceeded with; and after hearing the evidence adduced on the trial, the argument of counsel, and instructions of the court, the jury retire, under charge of a proper sworn officer, to consider of their verdict, and after being absent for a time, return into court here the following verdict: "We, the jury, find for the plaintiff, and assess his damages at $5,345.88 dollars. Wm. Jones, foreman." Which verdict is received by the court and ordered to be filed.

53½ And afterwards, to wit, on the 10th day of June, 1881, there was duly filed in said court a verdict in this cause, in words and figures as follows, to wit:

54 *Verdict.*

In the Circuit Court of the United States for the District of Oregon.

JAMES D. WALKER, Plaintiff,
vs.
JOSEPH TEAL, Defendant.

We, the jury, find for the plaintiff, and assess his damages at 5,345.88 dollars.

WM. JONES, *Foreman.*

Endorsed as follows: Filed June 10, 1881. R. H. Lamson, clerk, by P. Leonard, deputy clerk.

54½ And afterwards, to wit, on Monday, the 13th day of June, 1881, the same being the 35th judicial day of the regular April term of said court—Present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

55 *Judgment.*

In the Circuit Court of the United States for the District of Oregon.

JAMES D. WALKER
vs.
JOSEPH TEAL. } No. 658. June 13, 1881.

Now, at this day comes the plaintiff, by Mr. Benton Killin, of counsel, and moves the court for judgment upon the verdict of the jury heretofore rendered in this cause. Whereupon it is considered that said plaintiff do have and recover off and from the said defendant the sum of five thousand three hundred and forty-five dollars and eighty-eight cents, together with his costs and disbursements, herein taxed at $90.26.

55½ And afterwards, to wit, on the 13th day of June, 1881, there was duly filed in said court a motion for a new trial herein, in words and figures as follows, to wit:

56 *Notice of Motion for New Trial.*

In the Circuit Court of the United States for the District of Oregon.

JAMES D. WALKER, Pl'ff,
vs.
JOSEPH TEAL, Def't.

To James D. Walker, the plaintiff above named, and to Messrs. Shattuck & Killin, his attorneys:

You will please take notice, that on Saturday, June 18th, 1881, the defendant will move the court to set the annexed motion for hearing.

W. LAIR HILL,
DURHAM & THOMPSON,
AND H. T. BINGHAM,
Att'ys for Pl'ff.

UNITED STATES OF AMERICA,
State of Oregon, Multnomah County, } *ss:*

I, H. T. Bingham, being duly sworn, depose and say that I served the annexed motion for new trial, and also the notice to set the said motion down for hearing, upon Messrs. Shattuck & Killin, the attorneys for plaintiff, at Portland, Oregon, by leaving copies of

said motion and notice (certified to be true copies by me)
57 with the clerk of said Shattuck & Killin, at their office, between the hours of 11 and 12 o'clock a. m. of June 13th, 1881, said Shattuck and Killin being both absent from their office when I served said papers.

H. T. BINGHAM,
Of Att'ys for Def't.

Subscribed and sworn to before me, this 13th June, 1881.
R. H. LAMSON, *Clerk.*
By P. LEONARD, *Deputy Clerk.*

58 *Motion for New Trial.*

In the Circuit Court of the United States for the District of Oregon.

JAMES D. WALKER, Pl'ff,
vs.
JOSEPH TEAL, Def't.

Comes the defendant above named, by his attorneys, and moves the court to set aside the verdict heretofore, on the 10th day of June, 1881, rendered in this action, and for a new trial, upon the ground and for the reason:

That the court erred in sustaining the objections of the plaintiff to evidence offered by the defendant to prove that the defendant paid taxes upon the lands held by plaintiff and defendant as tenants in common in the counties of Polk and Benton, and for the rents and profits of which this action is brought, to wit, the taxes assessed, levied, and due in the year 1877 and paid by defendant in 1878, amounting to $170.12; the taxes assessed, levied, and due in the year 1878, and paid by defendant in the year 1879, amounting to $186.57; and the taxes assessed, levied, and due in the year 1879, and paid by the defendant in the year 1880;
59 amounting to $186.57; and also in sustaining the objection of the plaintiff to the evidence offered by the defendant to prove that defendant paid the taxes upon the lands held by plaintiff and defendant as tenants in common, in the county of Linn, and for the rents and profits of which this action is brought, to wit, the taxes assessed, levied, and due in the year 1877, and paid by defendant in 1878, amounting to $408.49; the taxes assessed, levied, and due in the year 1878, and paid by the defendant in 1879, amounting to $447.72.

To which said several rulings of the court the defendant then and there duly accepted.

W. LAIR HILL, DURHAM & THOMPSON,
And H. T. BINGHAM,
Att'ys for Def't.

I hereby acknowledge due service of a copy of the foregoing motion for a new trial upon me, this 13th day of June, 1881.

_____, _____,

Att'ys for Pl'ff.

Endorsed as follows: Filed June 13, 1881. R. H. Lamson, clerk, by P. Leonard, deputy clerk.

59½ And afterwards, to wit, on the 13th day of June, 1881, there was duly filed in said court plaintiffs' bill of costs and disbursements in this cause, in word sand figures as follows, to wit:

60 *Plaintiffs' Bill of Costs.*

United States Circuit Court, for the District of Oregon.

J. D. WALKER, Plaintiff,

vs.

JOSEPH TEAL, Defendant.

Plaintiffs' Bill of Costs and Disbursements.

Marshal's fees					$6 96
Clerk's fees					41 90
Paid witness, Robert Sinnott,	1 day,	2 miles			1 60
Joseph Barbierre,	1 "	2 "			1 60
Luther White,	2 "	210 "	travel		13 50
Aaron Condra,	2 "	208 "	"		13 40
Liable to pay John Catlin,	1 "	2 "			1 60
Charles Hodge,	2 "	2 "			3 10
Attorneys' fees					20 00
					$103 66
Less					13 40
					$90 26

STATE OF OREGON, *ss:*

I, B. Killin, plaintiff's attorney, being duly sworn, say that plaintiff has incurred liability and paid arising as above set forth in prosecuting this action.

B. KILLIN.

Subscribed and sworn to before me this 13th day of June, 1881.

R. H. LAMSON, *Clerk.*

By P. LEONARD,

Deputy Clerk.

61 Endorsed as follows: Filed June 13, 1881. R. H. Lamson, clerk. By P. Leonard, deputy clerk.

62 *Objections to Bill of Costs.*

In the Circuit Court of the United States, for the District of Oregon.

JAMES D. WALKER, Pl'ff,
vs.
JOSEPH TEAL, Def't.

Comes Joseph Teal, the defendant above named, and makes and files this his objection to the cost bill of plaintiff filed herein.

He objects to that portion of said bill claiming witness fees and mileage for the attendence of Aaron Conden as a witness for plaintiff, because the said Conden was not sworn and did not testify as a witness in the trial of said action; and because said Conden was not a material or necessary witness whose attendence was requisite for plaintiff on the trial.

W. LAIR HILL, DURHAM & THOMPSON AND H. T. BINGHAM,
Atty's for Def't.

The above objections sustained.

R. H. LAMSON, *Clerk.*

[Endorsed:] Filed June 15, 1881. R. H. Lamson, clerk. By P. Leonard, deputy clerk.

62½ And afterwards, to wit, on Saturday, the 18th day of June, 1881, the same being the 40th judicial day of the regular term of said court—Present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

63 *Order Setting Motion for New Trial for Hearing.*

In the Circuit Court of the United States for the District of Oregon.

JAMES D. WALKER
vs.
JOSEPH TEAL. } No. 658. June 18, 1881.

Now, at this day, comes the defendant herein, by Mr. George H. Durham, of counsel, and on motion of said defendant, it it ordered that the motion for a new trial in this cause be, and the same is hereby, set for hearing on Friday, June 24, 1881.

63½ And afterwards, to wit, on Friday, the 24th day of June, 1881, the same being the 43d judicial day of the regular April term of said court—Present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

64 *Order Continuing Hearing of Motion for New Trial.*

In the Circuit Court of the United States for the District of Oregon.

JAMES D. WALKER
vs.
JOSEPH TEAL. } No. 658. June 24, 1881.

Now, at this day, on motion of Mr. H. T. Bingham, of counsel for the defendant herein, it is ordered that the hearing of the motion for a new trial herein be, and the same is hereby, continued until Monday, June 27, 1881.

64½ And afterwards, to wit, on Monday, the 27th day of June, 1881, the same being the 44th judicial day of the regular April term of said court—Present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

65 *Motion for New Trial taken under Advisement.*

In the Circuit Court of the United States for the District of Oregon.

JAMES D. WALKER
vs.
JOSEPH TEAL. } No 658. June 27, 1881.

Now, at this day, comes the plaintiff by Mr. Benton Killin, and the defendant by Mr. H. T. Bingham, of counsel, and this cause comes on to be heard on defendant's motion for a new trial herein, and is argued by counsel and submitted to the court who will advise thereof.

65½ And afterwards, to wit, on Friday, the 8th day of July, 1881, the same being the 50th judicial day of the regular April term of said court—Present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

66 *Order Denying Motion for New Trial.*

In the Circuit Court of the United States for the District of Oregon.

JAMES D. WALKER
vs.
JOSEPH TEAL. } No. 658. July 8, 1881.

This cause having been heretofore heard on the motion for a new trial herein, and argued by Mr. Benton Killin, of counsel for plaintiff, and by Mr. H. T. Bingham, of counsel for defendant, and taken under advisement by the court; and now, at this day, the court being fully advised in the premises, it is ordered that said motion be, and the same is hereby, denied, and that said defendant is allowed thirty days from this date to file a bill of exceptions.

66½ And afterwards, to wit, on the 12th day of July, 1881, there was duly filed in said court a præcipe for execution, in words and figures as follows, to wit:

Præcipe for Execution.

67 In the Circuit Court of the United States, for the District of Oregon.

JAMES D. WALKER, Plaintiff,
vs.
JOSEPH TEAL, Defendant.

The clerk of the above-entitled court will issue execution in this cause.

B. KILLIN,
Attorney for Plaintiff.

Endorsed: Filed July 12, 1881. R. H. Lamson, clerk. By P. Leonard, deputy clerk.

67½ And afterwards, to wit, on the 12th day of July, 1881, there was issued out of said court an execution in this cause, in words and figures as follows, to wit:

68 *Execution.*

In the Circuit Court of the United States, for the Ninth Judicial Circuit, District of Oregon.

JAMES D. WALKER
vs.
JOSEPH TEAL. } No. 658. Execution.

The President of the United States of America to the marshal of of the district of Oregon, or to his deputy, Greeting:

Whereas on June 13, 1881, by consideration of the above-entitled court, James D. Walker, plaintiff, recovered judgment against Joseph Teal, defendant, for the sum of five thousand three hundred and forty-five dollars and eighty-eight cents ($5,345.88) damages, and the further sum of ninety dollars and twenty-six cents ($90.26) costs and disbursements, which judgment was enrolled and docketed in the office of the clerk of said court on said June 13, 1881.

Now, therefore, you are hereby commanded that out of the personal property of the said defendant, or if sufficient cannot be found, then out of the real property of the said defendant in your
69 district, on or after said June 13, 1881, you satisfy the sum of five thousand four hundred and thirty-six dollars and fourteen cents ($5,436.14) now due on said judgment, with interest thereon from the date of said judgment, at the rate of eight per centum per annum, and also the costs of and upon this writ, and the accruing costs; and that you make due return of the same.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court affixed at Portland, in said district, this July 12, 1881.

[UNITED STATES CIRCUIT COURT, OREGON.]

R. H. LAMSON, *Clerk.*
By P. LEONARD, *Deputy Clerk.*

Endorsed: Returned and filed August 6, 1881. R. H. Lamson, clerk. By P. Leonard, deputy clerk.

69¼ *Marshal's Return on Execution.*

DISTRICT OF OREGON, *ss:*

On this 6th day of August, 1881, I have received from the clerk of the U. S. circuit court for the district of Oregon a notice in writing, tested this 6th day of August, 1881, under the seal of said court, and to me directed, that a writ of error has been sued out in the within entitled cause, and that a bond has been filed therein by the defendant in the sum of ten thousand dollars, conditioned for the payment of all damages and costs that may be awarded the plaintiff, in case the defendant fails to make good his plea, and that said bond has been approved by the judge of said court. Therefore, I now return this writ of execution without service.

Dated Portland, said district, this 6th day of August, 1881.

E. S. KEARNEY,
United States Marshal for the District of Oregon.

69½ And afterwards, to wit, on the 28th day of July, 1881, there was duly filed in said court a bill of exceptions in this cause, in words and figures as follows, to wit:

70 *Bill of Exceptions.*

In the Circuit Court of the United States for the District of Oregon.

JAMES D. WALKER, Plaintiff, *vs.* JOSEPH TEAL, Defendant.

Be it remembered that on the 9th day of June, 1881, this cause came on for trial in the circuit court of the United States for the District of Oregon, before Honorable M. P. Deady, district judge, and was tried by a jury.

On the trial, the plaintiff, to maintain the issues on his part, called as a witness John Catlin, who testified that in the spring and summer of 1877 he was one of the attorneys engaged in efforts to collect the note of B. Goldsmith to James D. Walker, described in the written contract embodied in the complaint in this action, and was employed to foreclose the mortgage or trust deeds described in the complaint, which had been executed by B. Goldsmith and wife and defendant Teal and wife as security for said note; that he was employed by Henry Hewett, the trustee mentioned in the con-

tracts, to get possession of the lands described in the trust
71 deeds, and that on the 6th day of July, 1877, as the attorney of Hewett, he delivered a written demand to defendant Teal, and to W. H. Effinger, the attorney of B. Goldsmith, a paper, of which the following is a copy, was then shown witness:

"To Joseph Teal and B. Goldsmith.

"GENTS: The promissory note executed by B. Goldsmith to James D. Walker for $100,000, bearing date August 17th, 1874, in words and figures as follows:

"$100,000. PORTLAND, OREGON, *August* 19, 1874.

"Two years after date, without grace, for value received, I promise to pay to James D. Walker or order one hundred thousand dollars, with interest thereon from date till paid, interest to be paid monthly. Principal and interest to be paid in gold coin of the United States, and not otherwise, at the Bank of Falkner, Bell & Co., in the city of San Francisco, California, and if there be default in the payment of interest for the period of twenty days, then the whole sum, principal and interest, shall, at the option of the holder of this note, be immediately due and payable. Provided, that at any time after one year from date before maturity of this note the same, or any installment of not less than twenty thousand
72 dollars, exclusive of interest may, at my option, be paid on thirty days' notice to the holder.

(Signed) "B. GOLDSMITH.

"is due and no payments have been made thereon, excepting the interest up to the 21st day of December, 1876, and $3,250 of the principal sum prior thereto, and a further payment of $5,400 of the principal sum on the 10th day of April, 1877, leaving now due of the principal sum $91,350, with interest thereon from the 10th day of April, 1877, and interest on the sum of $96,750, from December 21st, 1876, to April 10th, 1877, the whole of which unpaid principal and interest is now more than thirty days overdue. I therefore demand the possession of all the lands, and of every parcel thereof, conveyed to me by yourselves and your respective wives, by your joint deeds, three of which deeds bear even date with said promissory note, and the other deed bears date the 14th day of October, 1876, which lands were conveyed to me in trust to receive the payment of said promissory note, according to the several written declarations of trust executed by yourselves and James D. Walker and myself, the first of which bears even date with said three first deeds, and the other bears bate the 18th day of October, 1876, by virtue
73 of and in accordance with the said declarations of trust, and by reason of the said default in the payment of said principal and interest, I now make this demand for the possession of said lands conveyed to me as aforesaid.

"Dated July 3d, 1877. HENRY HEWETT."

Whereupon the witness further testified that the paper shown him was a copy of the paper he delivered to defendant Teal on the 6th of July, 1877; that the paper he delivered to defendant Teal and the paper now shown him were both signed by Henry Hewett, and were in all respects alike, and he considered them both originals; but that the paper now shown him was not the same paper that he delivered to defendant Teal.

No evidence was offered tending to show the loss or destruction of the paper delivered to the defendant, or to account for its non-production, and no demand was claimed to have been made upon defendant for the production of the paper to be used at the trial.

The plaintiff then offered the paper shown to the witness as evidence, and proposed to read it to the jury; the defendant by
74 his counsel objected, on the ground that it was not the original paper delivered to defendant, and was incompetent to be used as evidence of the contents of the original paper.

The court overruled the objection of defendant, and permitted the paper to be read to the jury; and to this ruling and decision the defendant then and there excepted.

The plaintiffs called as a witness Robert Sinnott, who testified in substance that in the years 1877, '78, and '79, he leased parts of lots 6 and 7, in block 2, city of Portland. That some time in July, 1877, Hewett notified him not to pay any more rent to Teal; that he informed Teal of the notice, and that Teal told him not to pay any attention to the notice. It was thereupon admitted by defendant's counsel in open court that the other tenant in block 2 would testify to the same effect.

There was no evidence offered on the trial tending to prove a demand by the plaintiff or by Henry Hewett for the possession of the lands conveyed by the trust deeds, or any part thereof.

Further to maintain the issues on his part the plaintiffs called as a witness E. P. Coleman, who testified that during the years 1877 and 1878 and 1879 he was in the employ of the defendant Teal, and as his agent had charge of the lands in Linn county; that
75 during that period one hundred and sixty acres of those lands were rented to and occupied by one [—] Kraal; that another tract of those lands, including about sixty or seventy acres of plow land, was rented to and occupied by one [—] Tethero; and that another tract of those lands, including about forty acres of plow land, was rented to and occupied by one [—] Cobble; and that each of these tenants paid as rental for the land occupied by him one-third of the grain raised by him, which was delivered at the farm "in the half-bushel;" that he sold the grain received for rental at Harrisburg, and received the money therefor, amounting in the aggregate to about $1,267.44.

He further testified that during the same period he received for the hire of pasturage for stock upon the Linn county lands $300, and for timber sold off these lands about $25, and that he accounted

to defendant Teal for all the moneys received for the grain sold, for the pasturage, and for the timber.

It was admitted on the trial by defendant's attorneys that during all the time, from July 6th, 1877, until November 30th, 1879, defendant held possession and control of all the farms described in the complaint, and had the use and occupation thereof to his own use.

76 Plaintiff then called as a witness Luther White, who testified that he was acquainted with the Linn county lands, and that there was under cultivation of said lands, in 1877, 1878, and 1879, about two hundred acres, and that the Linn county lands embraced about one thousand acres of level prairie lands and about five thousand five hundred acres of "foot hill" lands and several hundred acres of rough timbered lands.

Plaintiff then called as a witness Gallatin Adkins, who testified the lands in Polk and Benton counties lie together in one body, and the line between the counties passes through them; that he, witness, had been living on those lands ever since the fall of 1877, a part of the time on a tract called the "Jewett Place," and a part of the time on a tract called the "Fuller Place;" that from the fall of 1877 to the fall of 1878 he occupied the "Jewett Place" as undertenant to one Tillard, who held the lands as tenant of defendant Teal, and that for the rental of the "Jewett Place" he paid Tillard one hundred and ten bushels of wheat.

Plaintiff then called as a witness Green B. Smith, who testified he was well acquainted with the lands in Polk and Benton counties; that there was in cultivation on the "Jewett Place" about

77 eighty or one hundred acres, and on the "Fuller Place" seventy-five or eighty acres; that he saw the crops growing on those places, but could not state what amount was produced.

There was no other evidence showing what the income of the lands in Linn, Polk, and Benton counties was during the period for which plaintiff sued for the use thereof.

Plaintiff then proved, and the defendant by his counsel admitted that the rents received from the property in block 39, in Portland, during the period complained of, exceed the necessary expense of keeping the same in repair and the taxes thereon by a sum greater than $3,000, and that the rents received for the property in block 2, in Portland, during the period complained of, exceeded the necessary expense of keeping the same in repair and the taxes thereon by a sum greater than $2,400.

The plaintiff then rested his case, and the defendant to maintain the issues on his part, called as a witness E. P. Coleman, who testified that it cost during the years 1877, 1878, and 1879, to prepare the wheat received by him as rental for the Linn county farm and to convey the same to market, about 20 cents per bushel; that wheat was sold for 75 cents per bushel; that there were

78 about [—] miles of fencing on the Linn county lands, and that the cost of labor and materials in keeping up the fencing

and buildings, and from improvements, and not including his own compensation for taking care of the property, was about $1,000 per year; that this expense was necessary to prevent the property from falling into decay and being wasted.

The defendant, as a witness on his own behalf, testified that the income of the lands in Linn, Polk, and Benton counties had never been equal to the cost of necessary repairs. He then testified that he paid all the taxes assessed and levied upon the lands in Polk and Benton counties, at the annual assessments and levies made in the fall of 1877, 1878, and 1879, and all the taxes assessed and levied upon the lands in Linn county, at the annual assessments and levies made in the fall of 1877 and 1878, and that he paid all said taxes before the commencement of this action.

The defendant then offered in evidence certified copies of the assessment rolls of the county of Benton for 1877, 1878, and 1879, with the levy of taxes extended thereon, for the purpose of showing
79 the amount of taxes paid on the lands in that county upon those assessments respectively, and showing the amount of taxes levied and paid to be on the levy made in the fall, September, 1877, $83.67; on the levy made in September, 1878, $94.12; on the levy made in September, 1870, $94.12; one-half of these several assessments having been paid by defendant on plaintiff's interest in said lands.

The plaintiff objected to the introduction of this evidence, on the ground that it was immaterial, because the payment of the taxes was not sufficiently pleaded, accompanying the objection with the statement that he admitted that the expenses proved exceeded the rents or profits in the lands in Linn, Polk and Benton counties respectively, and that he could claim nothing on account of the rents actually collected from any of these lands. On this admission the court sustained the objection to the introduction of the assessment rolls and levy, and excluded the same; and to this ruling and decision of the court, the defendant by his counsel then and there excepted.

The defendant then offered in evidence certified copies of the assessment rolls of the county of Polk, for 1877, 1878 and
80 1879, with the levy of taxes extended thereon for the same purpose for which the assessment roll and levy for Benton county had been offered, showing the amount of taxes levied and paid upon the lands in Polk county to be, on the levy made in September, 1877, $68.00; on the levy made in September, 1878, $74.00; on the levy made in September, 1879, $74.00; one-half of these several amounts having been paid by defendant on plaintiff's interest in said lands.

The defendant objected to the introduction of this evidence, on the ground that it was immaterial, in view of the admission made when the assessment rolls of Benton county were offered.

The court sustained the objection, and excluded the evidence,

and to this ruling and decision the defendant by his counsel, then and there excepted.

The defendant then offered in evidence certified copies of the assessment rolls of the county of Linn, for the years 1877 and 1878, with the levy of taxes extended thereon, for the purpose of showing the amount of taxes levied and paid on the lands in that county, and showing the amounts to be: on the levy made in September, 1877, $408.49; on the levy made in September, 1879, $447.27.

81 The plaintiff objected to the introduction of this evidence on the ground that it was immaterial, in view of the admission made when the assessment rolls of Benton county was offered. The court sustained the objection and excluded the evidence, and from this ruling and decision of the court the defendant, by his counsel, then and there, excepted.

The jury, on the cause being submitted to them, with the instruction that the plaintiff was not entitled to recover anything on account of the use and occupation of the lands in Linn, Polk, and Benton counties aforesaid, or for any rents or profits received by the defendant therefrom, found a verdict for the plaintiff in the sum of $5,345.38.

Whereupon the defendant asks to have this, his bill of exceptions allowed by the court, and signed and sealed, which is done.

MATTHEW P. DEADY, [L. S.]
U. S. District Judge, Oregon.

Endorsed: Filed July 28, 1881. R. H. Lamson, clerk. By P. Leonard, deputy clerk.

81½ And afterwards, to wit, on the 28th day of July, 1881, there was issued out of said court a citation in this cause, in words and figures as follows, to wit:

82 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To James D. Walker, Greeting: You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October, 1881, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Oregon, wherein Joseph Teal is plaintiff, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Morrison R. Waite, Chief Justice of said Supreme Court of the United States, this 28th day of July, in the year of our Lord one thousand eight hundred and eighty-one.

MATTHEW P. DEADY,
U. S. District Judge.

83 DISTRICT OF OREGON, *ss:*

I certify that I have duly served the within citation by delivering a true copy thereof (duly certified to by me as U. S. Marshal) to Benton Killen, att'y for defendant in error.

E. S. KEARNEY, *U. S. Marshal.*
By H. J. McCORMICK, *Deputy.*

Endorsed: No. 658. In the circuit court of the United States for the district of Oregon. James D. Walker, pl'ff, *vs.* Joseph Teal, def't. Citation. Returned and filed July 28, 1881. R. H. Lamson, clerk. By P. Leonard, deputy clerk.

83½ And afterwards, to wit, on the 28th day of July, 1881, there was duly filed in said court a bond on appeal in this cause, in words and figures as follows, to wit:

84 *Bond on Appeal.*

Supreme Court of the United States.

JAMES D. WALKER, Plaintiff, *vs.* JOSEPH TEAL, Defendant.

Know all men by these presents, that we, Joseph Teal, E. J. Jeffery, T. A. Davis, A. J. Knott, and A. N. King, are held and firmly bound unto James D. Walker in the sum of ten thousand dollars, to be paid to the said James D. Walker, his executors, or administrators, to which payment well and truly to be made we bind ourselves, and each of us jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals. Dated this 28th day of July, 1881.

Whereas the above-named Joseph Teal hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the district of Oregon.

Now, therefore, the condition of this obligation is such that if the above-named Joseph Teal shall prosecute his said writ
85 of error to effect and answer all costs and damages, if he fail to make good his plea, then this obligation shall be void, otherwise to remain in full force and virtue.

JOSEPH TEAL. [SEAL.]
E. J. JEFFERY. [SEAL.]
T. A. DAVIS. [SEAL.]
A. J. KNOTT. [SEAL.]
A. N. KING. [SEAL.]

Sealed and delivered in the presence of—
H. T. BINGHAM.

STATE OF OREGON, *Multonomah County,* } *ss:*

We, E. J. Jeffery, T. A. Davis, A. J. Knott, and A. N. King, being each severally duly sworn, say upon oath I am worth five

thousand dollars over and above all debts and liabilities, and exclusive of property exempt from execution; that I am a resident of the State of Oregon, and a freeholder or householder therein.

E. J. JEFFERY.
T. A. DAVIS.
A. J. KNOTT.
A. N. KING.

Subscribed and sworn to before me, this 28th day of July, 1881.

[NOTARIAL SEAL.] H. T. BINGAAM,
Notary Public for Oregon.

Endorsed: Filed July 28, 1881. R. H. Lamson, clerk. By P. Leonard, deputy clerk. Approved July 28, 1881. Matthew P. Deady, U. S. district judge, Oregon.

85½ And afterwards, to wit, on the 28th of July, 1881, there was issued out of said court a copy of writ of error in this cause, in words and figures as follows, to wit:

86 *Copy of Writ of Error.*

UNITED STATES OF AMERICA, *ss*:

The President of the United States, to the Judges of the Circuit Court of the United States, for the district of Oregon, greeting:

Because in the records and proceedings, and also in the rendition of the judgment of a plea, which is in the said circuit court before you, between James D. Walker and Joseph Teal, a manifest error hath happened to the great damage of the said Joseph Teal, as by his complaint appears. We being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington, on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings afore-
87 said being inspected the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court affixed at Portland, in said district, this 28th day of July, 1881.

[SEAL.] R. H. LAMSON, *Clerk.*
By P. LEONARD,
Deputy Clerk.

88 *Clerk's Certificate.*

UNITED STATES OF AMERICA, } ss:
District of Oregon, }

I, R. H. Lamson, clerk of the circit court of the United States for the district of Oregon, do hereby certify that the foregoing copies of pleadings, papers, orders, and journal entries, constituting the judgment roll in cause No. 658, James D. Walker *vs.* Joseph Teal, together with a copy of the bill of exceptions, the original writ of error, citation and marshal's return thereon, and copies of the bond on appeal, and writ of error, have been by me compared with the originals, and that they are correct transcripts therefrom and of the whole of such originals, as the same appears on file and of record at my office and in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Portland, in said district, this August 5, 1881.

[SEAL.] R. H. LAMSON, *Clerk.*
By P. LEONARD, *Deputy Clerk.*

Endorsed on cover: Oregon C. C. U. S. No. 280. Joseph Teal, plaintiff in error, *vs.* James D. Walker. Filed 27th August, 1881.

thousand dollars over and above all debts and liabilities, and exclusive of property exempt from execution; that I am a resident of the State of Oregon, and a freeholder or householder therein.

E. J. JEFFERY.
T. A. DAVIS.
A. J. KNOTT.
A. N. KING.

Subscribed and sworn to before me, this 28th day of July, 1881.

[NOTARIAL SEAL.] H. T. BINGAAM,
Notary Public for Oregon.

Endorsed: Filed July 28, 1881. R. H. Lamson, clerk. By P. Leonard, deputy clerk. Approved July 28, 1881. Matthew P. Deady, U. S. district judge, Oregon.

85½ And afterwards, to wit, on the 28th of July, 1881, there was issued out of said court a copy of writ of error in this cause, in words and figures as follows, to wit:

86 *Copy of Writ of Error.*

UNITED STATES OF AMERICA, *ss*:

The President of the United States, to the Judges of the Circuit Court of the United States, for the district of Oregon, greeting:

Because in the records and proceedings, and also in the rendition of the judgment of a plea, which is in the said circuit court before you, between James D. Walker and Joseph Teal, a manifest error hath happened to the great damage of the said Joseph Teal, as by his complaint appears. We being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington, on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings afore-
87 said being inspected the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court affixed at Portland, in said district, this 28th day of July, 1881.

[SEAL.] R. H. LAMSON, *Clerk.*
By P. LEONARD,
Deputy Clerk.

88 *Clerk's Certificate.*

UNITED STATES OF AMERICA, } ss:
District of Oregon, }

I, R. H. Lamson, clerk of the circit court of the United States for the district of Oregon, do hereby certify that the foregoing copies of pleadings, papers, orders, and journal entries, constituting the judgment roll in cause No. 658, James D. Walker *vs.* Joseph Teal, together with a copy of the bill of exceptions, the original writ of error, citation and marshal's return thereon, and copies of the bond on appeal, and writ of error, have been by me compared with the originals, and that they are correct transcripts therefrom and of the whole of such originals, as the same appears on file and of record at my office and in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Portland, in said district, this August 5, 1881.

[SEAL.] R. H. LAMSON, *Clerk.*
By P. LEONARD, *Deputy Clerk.*

Endorsed on cover: Oregon C. C. U. S. No. 280. Joseph Teal, plaintiff in error, *vs.* James D. Walker. Filed 27th August, 1881.

111-242

Supreme Court of the United States.

October Term, 1883.

JOSEPH TEAL, plaintiff in error,
vs.
JAMES D. WALKER.

MOTION FOR AN ORDER REVERSING JUDGMENT OF COURT BELOW AND DISMISSAL OF ACTION.

Now comes the plaintiff in error, by his attorney, and moves this court for an order reversing the judgment of the court below, and remanding cause to said court with instructions to dismiss action, for the reason—

1st. Because it clearly appears from the pleadings and bill of exceptions in this case, and especially from the complaint and replication, that this action does not really and substantially involve a dispute or controversy properly within the jurisdiction of the Circuit Court, or this court; and therefore it should be dismissed in pursuance of section five of the act of March 3, 1875.

2d. Because it clearly appears from the complaint that the matters complained of, and for which plaintiff prays damages, are purely and exclusively, if cognizable in any court, cognizable in a court of equity and *not* in a court of law, and therefore the Circuit Court was as a court of law without jurisdiction of the subject-matter.

3d. Because it appears from the complaint that it does not state facts cognizable in a court of law, and therefore

shows a want of jurisdiction of the subject-matter in the law side of the Circuit Court.

4th. Because it appears from the complaint that it does not state facts sufficient to constitute a cause of action, and that the facts stated show the subject-matter—the dispute—not to be within the jurisdiction of the Circuit Court.

And furthermore, that the dispute or controversy could not in the very nature of things confer jurisdiction upon or entitle plaintiff to recover in any court, Federal or State, either law or equity, because it appears from the complaint and replication that whatever rights plaintiff had under the deeds and defeasances were extinguished by a foreclosure and decree. They all became merged in the decree and sale; hence no action, either at law or in equity, can be maintained on any covenant therein.

JOHN H. MITCHELL,
Attorney for Plaintiff in Error.

WASHINGTON, D. C., *March 8th*, 1884.

111-242

Supreme Court of the United States

OCTOBER TERM, 1883.

No. 280.

JOSEPH TEAL, Plaintiff in Error,

vs.

JAMES D. WALKER, Defendant in Error.

In Error to the Circuit Court of the United States for the District of Oregon.

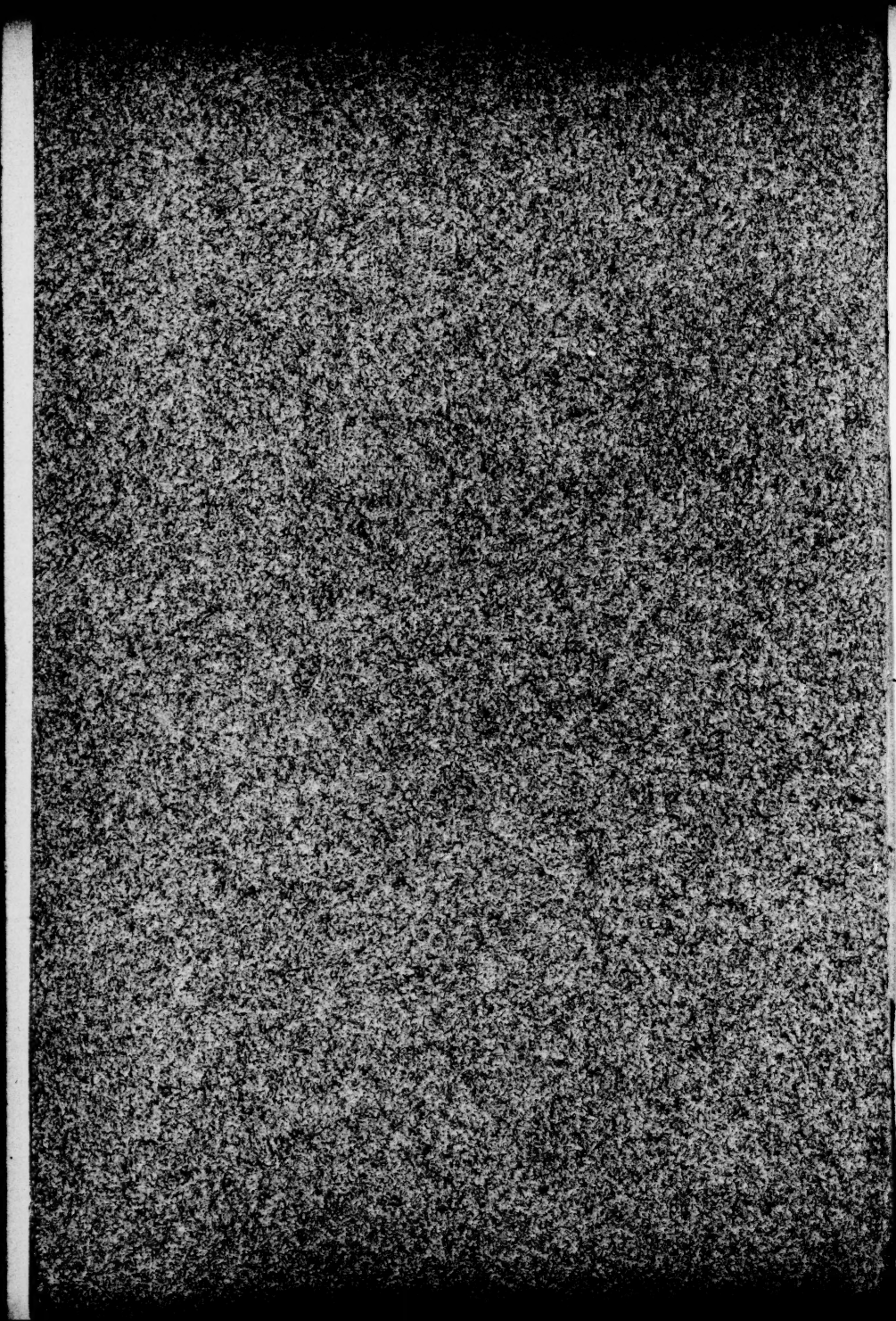
BRIEF AND ARGUMENT

OF

JOHN H. MITCHELL,

On Part of Plaintiff in Error.

Thomas McGill & Co., Law Printers, Washington, D. C.



Supreme Court of the United States.

OCTOBER TERM 1883.

JOSEPH TEAL, plaintiff in error,
vs.
JAMES D. WALKER, defendant in error. } No. 280.

In Error to the Circuit Court of the United States for the District of Oregon.

BRIEF AND ARGUMENT ON PART OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

James D. Walker, defendant in error, and who was plaintiff in the court below, is a British subject, and brought his action against Joseph Teal, a citizen of the State of Oregon, in the Circuit Court of the United States for the district of Oregon, to recover $16,000 damages alleged to have been sustained by him on account of the alleged refusal of the defendant, Teal, to deliver to him the possession of certain real property in Oregon, and for wrongfully withholding the same from him—a part from July 6, 1877, to November 30, 1878, and a portion from the former date until November 30, 1879, to wit, the south half of lots 2 and 7, in block 39, and the *undivided half* of the north half of lot 6, and the undivided half of the south half of lot 7, in block 2 in the city of Portland; also the *undivided half*

of a certain farm situated in Linn county, Oregon, and known as the Teal and Goldsmith farm; and the *undivided half* of a certain farm situated partly in Polk and partly in Benton counties, Oregon; and also on account of expenses alleged to have been incurred by the plaintiff in instituting and maintaining legal proceedings to enforce the sale of said lands over and above what it would have cost to dispose of the same if the defendant, Teal, had surrendered the possession thereof to the plaintiff, as it is claimed he was legally bound to do.

It is claimed that Teal, defendant below, had received as *rents* from the *lots* above mentioned, during the time covered by the claim of plaintiff as above, at the rate of $280 per month, amounting in the aggregate to $4,704, and that the reasonable rental value of the said *farms* during said period was $2,000 per year, or in the aggregate $2,800; and that the expenses incurred by plaintiff as aforesaid in instituting and maintaining legal proceedings, and for which he seeks to hold Teal responsible, amounted to $3,100.

Statement of the Transactions Leading to the Action.

On August 19, 1874, Bernard Goldsmith, of Portland, Oregon, borrowed from James D. Walker, plaintiff in the court below, the sum of $100,000, and for which he executed and delivered to Walker on that date his promissory note in words and figures as follows:

Portland, Oregon, *August* 19, 1874.

$100,000. Two years after date, without grace, for value received, I promise to pay James D. Walker, or order, one hundred thousand dollars, with interest thereon at the rate of 1 per cent. per month from date till paid, interest to be paid monthly; principal and interest to be paid in gold coin of the United States, and not otherwise, at the office of Falkner, Bell & Co., in the city and county of San Francisco, California, and if there be default in the

payment of interest for the period of twenty days, then the whole sum, principal and interest, shall, at the option of the holder of this note, be immediately due and payable; provided that any time after one year from date, before maturity of this note, the same, or any instalment not less than twenty thousand dollars, exclusive of interest, may at my option be paid on thirty days' notice to the holder.

(Signed) B. GOLDSMITH.

At the date of said note said B. Goldsmith and Joseph Teal, the defendant in the court below, were the joint owners and tenants in common of the *farms* aforesaid; and said Teal, in consideration of said loan of $100,000 by Walker to Goldsmith, agreed to become surety for said Goldsmith to the extent *only* however of his (Teal's) interest and estate in said *farms*; and by agreement of parties, as alleged in the complaint, the security for the payment of said money was taken in the form of trust deeds, with a separate defeasance or declaration of trust by way of mortgage instead of mortgages proper, and such security was to include not only the joint interest and estate of Teal and Goldsmith in the *farms* aforesaid in Linn, Polk, and Benton counties, Oregon, but also the joint interest of said Teal and Goldsmith in a tract of land situate in Clackamas county, Oregon, known as the Athey Donation claim, containing about 605 acres; and also all the interest and estate of B. Goldsmith of certain lands held by him in fee in the counties of Clackamas, Multnomah, and Washington, in the State of Oregon, and in Clarke county, Washington Territory, amounting in the aggregate to 8,690 acres.

(See Complaint, Record, 3.)

On said August 19, 1874, the plaintiff in error, Joseph Teal, and said Bernard Goldsmith, as joint owners and tenants in common of the farms aforesaid in Linn, Benton, and Polk counties, and of the Athey Donation claim in Clackamas county, conveyed the same to one Henry Hewett by a conveyance absolute in form; and said Bernard Gold-

smith on the same date conveyed to said Henry Hewett the other farms above mentioned, situate in Clackamas, Multnomah, and Washington counties, Oregon, and Clarke county, Washington Territory; also by a conveyance absolute in form, but ~~as~~ also set forth in a contemporaneous defeasance and agreement signed by the plaintiff, and defendant, and said Hewitt and Goldsmith, *all* to be held by him, said Hewett, *in trust* as a security for the payment of the note of B. Goldsmith to James D. Walker, aforesaid.

By the terms of the defeasance executed and delivered by B. Goldsmith, Joseph Teal, Henry Hewett, and Jas. D. Walker contemporaneously with the execution and delivery of said promissory note and said deeds of conveyance, it was stipulated and provided as follows:

1st. "Said Hewett holds the legal title to all the lands in the above-mentioned deeds described in trust, and to the uses herein described."

2d. "Subject to the legal title in said Hewett as aforesaid, Teal and Goldsmith, or Goldsmith alone, shall retain and have possession of and control over all the said lands, and enjoy and have, without account, the issues, rents, and profits thereof until such time as the promissory note above described shall become due, and being overdue remain thirty days unpaid; and upon such default in payment being made, said Goldsmith, and Teal and Goldsmith, will and shall *on demand*, personally surrender to said Hewett, or his representatives or successors in said trust, the possession of all said lands and every part thereof, to be by him disposed of as herein provided; it being understood and agreed that until and up to the time that said default in payment of said note shall happen, and said possession of said land delivered to said Hewett or his successors in trust, the said Goldsmith, and Teal and Goldsmith, will and shall pay all taxes of every sort and name, and all assessments and public charges levied on, or becoming a lien on said land, and that if they fail to so pay in due time such taxes, charges, and assessment, the said trustee may pay the same, and whatsoever sum he may so pay the same shall be added to the principal debt against said B. Goldsmith, and

shall be repaid, with interest at one per cent. per month from date of payment, out of said lands, and be deemed a lien thereon."

3d. "If the above recited promissory note, and the interest thereon, and all the taxes, charges, and assessments on said land, be duly paid by said Goldsmith, or for him, then the deeds aforesaid shall be deemed void, and said Hewett, or his representatives or successors in trust, shall reconvey all said lands, and every part thereof, to said Teal and Goldsmith, or said Goldsmith, or their representatives entitled thereto. But if the said Goldsmith shall fail to pay the above-described promissory note, or the interest thereon, and default being so made that according to the tenor of said note the same shall be thirty days overdue, then said Henry Hewett, or his successors in trust, may and *shall proceed and take possession of said lands;* and on thirty days' notice in writing to said Teal and Goldsmith, or said B. Goldsmith, requiring them to pay said debt, (including also any delinquent taxes, or any taxes paid by said trustee as hereinbefore provided,) and on their failure so to pay, shall sell the same at public auction on not more than thirty days' public notice, either in parcels or in a body, (that is to say, the Linn county lands in a body, and the Polk county and Benton county lands in a body or in parcels,) at the option of said trustee, and such sale shall be for cash, and the party of the third part may at his option, being the highest bidder, become and be the purchaser, taking and applying the land purchased upon and in satisfaction in full or *pro tanto* of the debt aforesaid. * * * It is expressly understood, however, that when sufficient lands have been sold to pay said debt and charges, the residue of said lands remaining in the name of said trustee are to be reconveyed over to said Teal and Goldsmith, or Goldsmith alone, as the right may be. And upon the sale of said lands, or any portion of them, the said trustee is to dispose of the proceeds of sale in manner following, to wit:

1st. Pay thereout the costs, expenses, and charges of sale, and the reasonable charges of the trustee for the making of such sale and the deeds thereunder.

"2d. Pay thereout any delinquent taxes or refund and reimburse said trustee for his payment of any such taxes

or assessments on said loan, with interest as herein provided.

"3d. Pay and satisfy said promissory note and interest according to its terms.

"4th. Any residue of money left, pay over to said Teal and Goldsmith, or their representatives."

(See Complaint, Record, 4 and 5.)

On October 18th, 1876, there was remaining due and unpaid upon said note the sum of $96,750, when it was agreed between plaintiff and defendant and said Hewett and Goldsmith that, in consideration of additional security, the time of payment thereof should be extended one year, but upon the stipulation as aforesaid, that if default was made in the payment of the principal or interest, the whole sum should become due and payable as provided in said defeasance of August 19th, 1874. And the said Goldsmith and wife on said date, (October 18th, 1876,) in consideration of such extension, conveyed to said Hewett the *lots* aforesaid, to wit, the south half of lots numbered 2 and 7 in block numbered 39 in the city of Portland, by a conveyance *absolute in form*, but as set forth in a second deed of defeasance of date October 18th, 1876, to be held by him as an additional security for the payment of the note aforesaid, and in the manner and for the purposes mentioned in the agreement or deed of defeasance of August 19th, 1874, which agreement was not to be thereby annulled or set aside except so far as the latter might conflict with the former, but the two agreements were "to be taken and construed together."

On the same date—October 18, 1876—said B. Goldsmith and Emma, his wife, and Joseph Teal and Mary E. Teal, his wife, as a part of the consideration for the extension of time on said note, executed and delivered to said Henry Hewett deeds of conveyance, absolute in form, for the north half of lot numbered 6, and south half of lot numbered 7, in block numbered 2, in the city of Portland; and also

certain *other* tracts of land situated in Linn county, Oregon; all of which lands were, by the terms of the deed of defeasance of the same date, "*to be held in trust by the said Hewett,* as all other lands heretofore conveyed by said Goldsmith and Teal, and referred to in said agreement, are by him held, and for the uses and purposes herein named and in said agreement specified."

(Record, 7.)

The agreement or defeasance, of date October 18, 1876, also provided as follows:

"That nothing herein contained shall be so construed as to prevent or prohibit said trustee from selling said land to him conveyed, as provided in said agreement of August 19, 1874, upon the default of the payment of said principal sum and interest, as hereinabove provided that the same shall be paid."

(Record, 8.)

The said agreement or defeasance, of date October 18, 1876, further provided that in case of default in making any payment, then the "said property conveyed to said Hewett in trust, and mentioned and referred to in said agreement of August 19th, 1874, and said property hereinbefore described or referred to, shall be sold for the payment thereof, as by law and in said agreement provided, and for the payment of such attorney fee as the court may adjudge reasonable, in case suit shall be instituted."

(Record, 8.)

The complaint avers that no part of the interest on said sum of $96,750 was paid after January 21st, 1877; and further—

That in April, 1877, said B. Goldsmith conveyed all of said lands (which it is hereinbefore alleged that he owned and conveyed to said Hewett,) to defendant Teal, and gave him possession thereof. The complaint further avers

that on July 6th, 1877, no part of said $96,750, or the interest after January 21st, 1877, having been paid, "said Hewett demanded from defendant the possession of all said lands, in pursuance of the said contracts, and he refused to surrender the possession of any part of it, and held possession of said *lots* until the 30th day of November, 1878, and said *farms* until November, 1879. That he collected rents during the time he held possession of the south half of lots 2 and 7, in block 39—thereof and from the same, amounting to $200 per month—and from the undivided half of the north half of lot 6, and the undivided half of the south half of lot 7, in block 2, amounting to $80 per month. That the reasonable rental value of the *undivided half* of said farm in Linn county was $1,500 per year during said period, and of the *undivided half* of said farm in Polk and Benton counties $1,500 per year during said period.

The complaint concludes in the following most remarkable manner:

"That by reason of defendant's refusal to surrender the possession of said lands to said Hewett, this plaintiff was obliged to and *did* institute a suit against defendant and others to enforce the sale of said lands, and to make his money out of the same; and in employing counsel and procuring a sale of said lands he was obliged to expend and pay out the sum of $3,000.

"That if the defendant had surrendered said lands, and they had been sold by said Hewett under the agreement in said contracts, the expense of making the sales and the compensation of said Hewett would not have been more than $500.

"That all the lands which plaintiff held as security for his said demands against said B. Goldsmith *have been sold*, either *in accordance with the terms of said agreement or by decree of court*, and the entire sale realized only $——; and said Goldsmith has not, nor has he had since April, 1877, any other property out of which any part of plaintiff's demands could be made, and there is still justly due, owing,

and unpaid on said demand of plaintiff against said B. Goldsmith over $50,000, and he has no ability to pay any part of it.

"That by reason of defendant's refusal to surrender the possession of said property to said Hewett this plaintiff has been damaged in the sum of $16,000. Whereupon he prays judgment against defendant for $16,000, and his costs and disbursements of this action."

(Record, 10.)

To this complaint defendant Teal by his attorney interposed a general demurrer; and for ground of demurrer says:

"Said complaint does not state facts sufficient to constitute a cause of action."

(Record, 12.)

The questions raised by this demurrer were argued October 20, 1880, submitted to the court and taken under advisement, and on January 10, 1881, the court being sufficiently advised, the following order was entered:

"Now, at this day," * * * * "it is ordered that said demurrer be, and the same is hereby, overruled, with leave to defendant to answer within twenty days."

(Record, 13.)

On the same date, January 10, 1881, the court below, the district judge presiding, issued an opinion giving reasons why said demurrer was overruled.

(Record, 13–20.)

Time for filing answer having subsequently been extended by a stipulation and order of the court, the defendant Teal, on March 5, 1881, filed his answer.

(Record, 22–23.)

ANSWER.

The answer of Teal denies "that on the 6th day of July, 1877, or at any time, the said Henry Hewett, or any one, demanded the possession of the said undivided half of the said lands in pursuance of the provisions of said contracts, or otherwise, and denies that defendant refused to surrender the possession of said lands, or any part thereof, to the said Hewett, or to any one."

Denies that "he collected rents for the said undivided half of the north half of lot 6, and the undivided south half of lot 7, in block No. 2, in the city of Portland, amounting to $80 per month, or any other or greater sum than $75 per month during the time which said premises were rented."

"But the defendant avers that during the time mentioned in the complaint the said premises were not at all times rented, and could not be, and he avers that the reasonable rental value of said premises during said term was not to exceed the sum of $70 per month."

"Defendant denies that the said undivided half of the said farm in Linn county was of the reasonable value of $1,500 per year, or any other or greater sum than $256.20 per year."

"Denies that the said undivided half of the said farm in Polk and Benton counties was of the reasonable rental value of $500, or any other sum whatever."

Defendant alleges "that during the time mentioned in the complaint he expended for necessary improvements *and taxes* upon the said north half of lot 6, and the said south half of lot 7, in block No. 2, the sum of $409.28."

"That during said time the defendant expended and paid out for necessary repairs and improvements upon said Linn-county farm, *and for taxes thereon*, the sum of $8,000."

"That during said time defendant *paid taxes* upon said Polk-county farm amounting to $200, and upon that part of said lands lying in Benton county the sum of $200. That the one-half of each of the said items of necessary expenses *and taxes* is due and owing from the plaintiff to this defendant, and the plaintiff refuses to pay the same, &c."

The answer further avers in substance and effect that defendant had devoted his time to "caring for and managing the said lands described in the complaint, and that the reasonable value of such services so rendered was and is the sum of $6,000, the one-half of which is due from the plaintiff to the defendant, and the plaintiff refuses to pay the same, although demanded so to do."

Defendant further "denies that by reason of the defendant's refusal to surrender the possession of said lands to said Hewett, or to any one, the plaintiff was obliged to institute a suit against the defendant, or any one, to enforce the sale of said lands, or for any purpose."

"Denies that plaintiff was obliged to or did, to the knowledge of this defendant, pay out the sum of $3,600, or any sum, in employing counsel to procure a sale of said lands."

"But, on the contrary, the defendant avers that he never at any time made any defense against the claim of right to sell the said half of said lands which belonged to said Goldsmith, and it never was necessary for the defendant to institute any action, suit, or proceeding therefor, or to employ attorneys for that purpose."

And, in conclusion, the defendant in his answer denies that "by reason of the defendant's refusal to surrender the possession of the said lands to the said Hewett, the plaintiff has been damaged in the sum of $16,000, or any other sum. But the defendant avers that by reason of the premises the

plaintiff is indebted to the defendant in the sum of three thousand five hundred dollars, and for interest thereon from November 1st, 1879, and the defendant prays judgment therefor, as well as for his costs and disbursements."

(Record, 22, 23.)

REPLICATION.

On March 9th, 1881, the plaintiff filed his reply, in which he averred that he had not any knowledge or information sufficient to form a belief as to whether "defendant, during the times mentioned in the complaint, expended for necessary improvements *and taxes*, or *either of them*, upon said north half of lot 6 and the said south half of lot 7, in block 2, the sum of $409.20, or any part thereof." * * * Or as to whether during said time "defendant expended for necessary repairs and improvements, or either of them, upon said lots 2 and 7, in block 39, the sum of $68.75, or any sum." Or whether during said time "defendant expended or paid out for necessary repairs or improvements *and taxes thereon*, or for either repairs, improvements, *or taxes, or any of them*, on said Linn-county farm, the sum of $8,000, or any sum whatever." Or whether during said time the "defendant *paid taxes* upon said Polk-county farm amounting to $200, or any sum; or as to whether during said time he *paid taxes* upon said lands lying in Benton county amounting to $200, or any sum."

"Denies that one-half of each or any of said items of necessary expenses *and taxes*, or any part of either of said items, is due from plaintiff to defendant. Denies that any demand has been made upon him for any of said taxes or expenses."

Alleges that he has not any knowledge or information sufficient to form a belief as to whether during said time mentioned in the complaint, or for any part of it, "defendant devoted his time in caring for or managing the lands

described in the complaint, or any of them, or whether the reasonable value of such service so rendered was or is the sum of $6,000, or any sum."

"Denies that one-half, or any part of said sum, is due from plaintiff to defendant. Denies that demand has been made upon him for said sum, or any part of it. Denies that it never was necessary for plaintiff to institute any action, suit, or proceeding *to foreclose his lien upon said lands*, or to employ attorneys for that purpose. Denies that by reason of the premises the plaintiff is indebted to the defendant in the sum of $3,500, or any part of it, or for interest thereon, or on any part of it, since November 1st, 1879," or any of said time.

(Record, 24.)

Subsequently a jury were empanelled to try the issues of fact thus joined, and on June 10th, 1881, said jury rendered their verdict as follows:

"We, the jury, find for the plaintiff, and assess his damages at $5,345.88."

(Record, 31.)

June 13th, 1881, the defendant, by his attorneys, filed a motion for a new trial, and the plaintiff, by his attorney, filed motion for judgment on the verdict, which last motion was allowed, and judgment was rendered on the verdict for $5,345.88, and $90.26 costs and disbursements.

(Record, 31, 32.)

July 8th, 1881, the court overruled the motion for a new trial, and the defendant was allowed thirty days to file a bill of exceptions.

(Record, 35.)

July 28th, 1881, there was duly presented, allowed by the court, signed, sealed and filed, the defendant's bill of exceptions.

(Record, 37–42.)

Assignment of Errors.

1st. The court erred in overruling defendant's demurrer to the plaintiff's bill of complaint.

2d. The court erred in deciding that the complaint stated facts sufficient to constitute a cause of action.

3d. The court erred in not sustaining defendant's demurrer to the complaint, and in not dismissing plaintiff's complaint.

4th. The court erred in overruling the objection of defendant to the admission as evidence of the paper signed by Henry Hewett, and addressed to Joseph Teal and B. Goldsmith, bearing date July 3, 1877, and referred to by the witness John Catlin, and copied in full in the bill of exceptions, page 38 of Printed Record.

5th. The court erred in permitting the paper just described in the 4th assignment of error to be read to the jury.

6th. The court erred in sustaining the objection of plaintiff to the offer of defendant to introduce in evidence and before the jury certified copies of the assessment rolls of the county of Benton for 1877, 1878, and 1879, with the levy of taxes extended thereon, for the purpose of *showing the amount of taxes paid* on the lands in that county upon those assessments, respectively, and showing the amount of taxes levied and paid to be, on the levy made in the fall, September, 1877, $83.67; on the levy made in September, 1878, $94.12; on the levy made in September, 1879, $94.12, one-half of these several assessments having been paid by defendant on plaintiff's interest in said lands, and which offer is set out fully in the bill of exceptions and Printed Record, page 41.

7th. The court erred in sustaining the objection of the plaintiff to the offer of defendant to place in evidence before the jury certified copies of the assessment rolls of the county of Polk for 1877, 1878, and 1879, with the levy of taxes extended thereon, for the same purpose for which the assessment roll and levy for Benton county had been offered, showing the amount of taxes *levied and paid* upon the lands in Polk county to be, on the levy made in September, 1877, $68; on the levy made in September, 1878, $74; on the levy made in September, 1879, $74, one-half of these several amounts having been paid by defendant on plaintiff's interest in said lands, and which offer is fully set out in the bill of exceptions, and showing the ruling of the court thereon to have been duly excepted to at the time by defendant. (See Printed Record, page 41.) And the court erred in excluding said evidence.

8th. The court erred in sustaining plaintiff's objection to the offer of the defendant to introduce in evidence before the jury certified copies of the assessment rolls of the county of Linn for the years 1877 and 1878, with the levy of taxes extended thereon, for the purpose of showing the amount of taxes *levied and paid* on the lands in that county, and showing the amounts to be, on the levy made in September, 1877, $408.49; on the levy made in September, 1879, $447.27, and which offer is fully set out in the bill of exceptions, and showing that the ruling of the court was excepted to at the time. (Printed Record, page 42.) And the court erred in not permitting said evidence to go to the jury.

9th. The court erred in holding that the estate of Goldsmith in the lands in question was one upon a *conditional limitation;* that his right to the possession terminated *eo instanti* on failure to pay interest when due, or within the days of grace given in the mortgage, and that no demand was necessary.

10th. The court erred in ruling, 1st, that no demand was necessary; and, 2d, that if necessary a demand for the possession of the whole instead of the undivided half of the lands was sufficient.

11th. The court erred in not dismissing plaintiff's action, on the ground that it appeared from the complaint that it did not really and substantially involve a dispute or controversy properly within the jurisdiction of said court.

12th. The court erred in overruling the defendant's motion for a new trial and in rendering judgment on the verdict.

13th. The court erred in rendering judgment on the verdict; because it appeared from the complaint and all the pleadings in the case, taken together, that the court had no jurisdiction of the subject-matter of this action.

ARGUMENT.

Demurrer to Complaint.

Its failure to state facts sufficient to constitute a cause of action.

The argument as to the total insufficiency of this complaint, and its utter failure to state facts sufficient to constitute a cause of action, will proceed in this brief, notwithstanding the *general rule* that pleading over is a waiver of the demurrer; and for the reason that this rule should and does have its exceptions:

1st. Where it is clear, from the facts stated, that the court has no jurisdiction of the subject-matter; and

2d. Where the whole record clearly discloses the fact, as in this case, not only that no facts sufficient to constitute a cause of action or to confer jurisdiction are stated, but that by *no possible amendment*, in the very nature of the transactions upon which the action is based, *could facts be stated* sufficient to constitute a cause of action, or confer jurisdiction; and that in either of the exceptions stated this court will *not* allow the rights of a party litigant to be frittered away, and finally swallowed up, either through a series of honest mistakes chequering the record on every page, or, as it may sometimes happen through what is still less pardonable, an inexcusable ignorance of the law, or a willful betrayal of trust upon the part of counsel in an inferior court.

That the demurrer to the complaint would, if the decision of the court below had been properly excepted to by defendant's counsel, and there had been no waiver by pleading over, have been held good by this court, the decision going to the defeat of plaintiff's *entire cause of action* beyond the possibility of amendment—will, it is submitted, be made clearly apparent by what is to follow in this brief and argument. And as it must appear to the

court not only that the complaint fails to state facts sufficient to constitute a cause of action, but that the *subject matter of the action* is such as the court below, as a court of law, *had no jurisdiction over whatever*, it is submitted that inasmuch as there is nothing in the record to support a judgment, this court will reverse the action of the court below and direct a dismissal of the case.

Whatever rights the plaintiff could possibly have to the rents and profits involved were purely *equitable rights*, growing *solely* out of the *lien of his mortgage*. And the enforcement of any such rights belonged *exclusively* to a court of *equity* and not to a court of *law*, and for this reason, and because it further appears from the complaint that plaintiff had *exhausted* his equitable remedy, and his mortgage had become *merged* in a decree, therefore the court below was clearly without jurisdiction.

Point I.

It is submitted, therefore, that this cause should have been dismissed by the Circuit Court, irrespective of the demurrer and regardless of any motion to that effect, and of its own motion. And for the reason that the facts stated in the complaint, and upon which plaintiff relies, show conclusively that the dispute or controversy involved is not one properly within the jurisdiction of the Circuit Court, nor in fact of any other court of either *law* or *equity*.

And in this connection appellant begs to submit a motion direct for dismissal, which motion is as follows, and has been duly filed in this court:

Motion to Dismiss.

Now comes ~~the appellant~~ pltf in error, by his attorney, and moves this court for an order reversing the judgment of the court below, remanding cause to said court, with instructions to dismiss action for the reasons—

1st. Because it clearly appears from the pleadings and bill of exceptions in this case, and especially from the complaint and replication, that this action does not really and substantially involve a dispute or controversy properly within the jurisdiction of the Circuit Court or this court, and, therefore, should be dismissed in pursuance of section five of the act of March 3d, 1875.

2d. Because it clearly appears from the complaint that the matters complained of, and for which plaintiff prays damages, are purely and exclusively—if cognizable in any court—cognizable in a court of equity and *not* in a court of law; and therefore the Circuit Court was without jurisdiction of the subject-matter.

3d. Because it appears from the complaint that it does not state facts cognizable in a court of law, and therefore shows a want of jurisdiction of the subject-matter in the law side of the Circuit Court.

4th. Because it appears from the complaint that it does not state facts sufficient to constitute a cause of action, and that the facts stated show the subject-matter—the dispute—not to be within the jurisdiction of the Circuit Court.

And furthermore, that the dispute or controversy could not, in the very nature of things, confer jurisdiction upon or entitle plaintiff to recover in any court, Federal or State, either law or equity, because it appears from the complaint and replication that whatever rights plaintiff had under the deeds of trust and defeasances were extinguished by a foreclosure and decree, they all became merged in the decree and sale; hence no action either at law or in equity can be maintained on any covenant therein.

The cause should have been dismissed by the court below, and should be here, under section 5 of the act of March 3d, 1875, (18 U. S. Stat., 472.)

Holmes *v.* Oakland, 104 U. S. Rep., 450.
Williams *v.* Nottowa, 104 U. S. Rep., 209.
Detroit *v.* Dean, 106 U. S. Rep., 537.
Hayden *v.* Manning, 106 U. S. Rep., 586.

In most of these cases the question of jurisdiction was first urged in this court.

In Oelrichs *v.* Spain, 15 Wall., 211, this court said:

"In the jurisprudence of the United States the objection that there is an adequate remedy at law raises a jurisdictional question, and may be enforced by the court *sua sponte* though *not raised by the pleadings, nor suggested by counsel.*"

Can there be any doubt that the question sought to be raised by this motion is a jurisdictional one?

What is this action? It is not an action on the note, nor is it a suit in equity to foreclose the lien of the mortgage; it is neither of these, and yet all the rights plaintiff can possibly have grow out of either the note or mortgage, or both. Nor yet is it a possessory action to recover the land after judgment or decree, or sale; on the contrary, the plaintiff tells the court in his complaint—1st, that he had a note; 2d, that this note was secured by a mortgage; 3d, that he foreclosed that mortgage; 4th, that *all* the lands included in the mortgage and involved in the complaint were, prior to commencement of this action, sold under a decree of foreclosure; 5th, that there is a balance due and owing on the note, and this action at law is brought to recover damages from the assignee of the mortgagor for use and occupation of the lands mortgaged prior to and during foreclosure and sale.

So far as the mortgage lien is concerned, and all the rights of plaintiff that could possibly grow out of the same, the controversy *ended* with the decree of foreclosure, and sale and conveyance of the mortgaged premises, and nothing after that date was left as a subject-matter to which the jurisdiction of *any court* could attach; neither the Circuit Court nor any other court could, after that date, obtain jurisdiction of any matter or thing connected with or growing out of the lien of the mortgage any more than they

could obtain jurisdiction of a dead man. All causes of original action *died with the sale of the mortgaged premises under the decree of foreclosure;* therefore the question now raised is a question of jurisdiction fully and fairly presented by the record.

And upon this general question of jurisdiction of *subject-matter*, and of the duty of the courts aside from anything contained in the 5th section of the act of 1875, to dismiss for want of jurisdiction at any time, either in the inferior or appellate courts, attention is recalled to the following extended extracts from the opinion of this court in the *causa celebris* of The State of Rhode Island *v.* The State of Massachusetts, (12 Peters, 719:)

"However late this objection has been made, or *may be made* in any case," (a motion by the defendant to dismiss the bill for want of jurisdiction in the cause,) "in an inferior *or appellate court of the United States*, it must be considered and decided before any court can move one further step in the cause, as any movement is necessary for the *exercise of jurisdiction.*

* * * *

"A motion to dismiss a cause pending in the courts of the United States is not analogous to a plea to the jurisdiction of a court of common law or equity in England. There the superior courts have a general jurisdiction over all persons within the realm and all causes of action between them. It depends on the subject-matter whether the jurisdiction shall be exercised by a court of law or equity; but that court to which it apparently belongs can act judicially upon the party and the subject of the suit, unless it shall be made apparent to the court that the judicial determination of the case has been withdrawn from the court of general jurisdiction to an inferior and limited one.

"It is a necessary presumption that the court of general jurisdiction can act upon the given case, when nothing appears to the contrary. Hence has arisen the rule that the party claiming an exemption from its process must set out the reasons by a special plea in abatement, and show that some inferior court of law or equity has the exclusive cog-

nizance of the case. Otherwise the superior court must proceed in virtue of its general jurisdiction. This rule prevails both at law and in equity. (1 Ves. Sen., 204; 2 Ves. Sen., 307; Mit., 183.) A motion to dismiss, therefore, cannot be entertained, as it does not and cannot disclose a case of exception; and if a plea in abatement is put in, it must not only make out the exception, but point to the particular court to which the case belongs. A plaintiff in law or equity is not to be driven from court to court by such pleas; if a defendant seeks to quash a writ or dismiss a bill for such cause, he must give the plaintiff a better one, and shall never put in a second plea to the jurisdiction of that court to which he has driven the plaintiff by his plea. (1 Ves. Sen., 203.)

"There are *other classes* of cases where the objection to the jurisdiction is of a different nature, as on a bill in chancery; that the subject-matter is cognizable only by the King in council, and not by any judicial power, (1 Ves. Sen., 445;) *or* that the parties, defendant, cannot be brought before any municipal court on account of their sovereign character and the nature of the controversy, as 1 Ves., pp. 371, 387; 2 Ves., pp. 56, 60; *or in the very common cases which present the question whether the cause properly belongs to a court of law or equity.* To such cases a plea in abatement would not be applicable, because the plaintiff could not sue in an inferior court; the objection goes to the *denial of any jurisdiction of a municipal court in one class of cases*, and to the *jurisdiction of any court of equity or law in the other.* An objection to jurisdiction on the ground of exemption from the process of the court in which the suit is brought, or the manner in which a defendant is brought into it, is waived by appearance and pleading to issue; (10 Peters, 473; Tolever *v.* Sprague, 12 Peters, 300;) *but when the objection goes to the power of the court over the parties or the subject-matter*, the defendant need not, for he *can not, give the plaintiff a better writ or bill.* Where no inferior court can have jurisdiction of a case in law or equity, the ground of the objection is not taken by plea in abatement, as an exception of the given case, from the otherwise general jurisdiction of the court. Appearance does not cure the defect of judicial power, and it may be relied on by plea, answer, demurrer, *or at the trial or hearing*, unless it goes to the man-

ner of bringing the defendant into court, which is waived by submission to the process."

The State of Rhode Island *v.* The State of Massachusetts, 12 Peters, 718–9.

In the case at bar the objection goes to the *power of the court over the subject-matter.* The facts stated in the complaint not only show this absolute want of power in the Circuit Court, but also that no court, either Federal or State, law or equity, *could have power.* And furthermore, that by no *possible amendment* could jurisdiction be given of the alleged controversy to *any court.*

This action is, in a word, equivalent to a complaint which stated that on a certain date the defendant had executed and delivered his note to the plaintiff for $1,000, payable one year after date, with interest. And further, that six months after the note matured plaintiff had brought an action on the note and obtained a judgment for the amount due. And now he brings his action on the note thus *merged* and *dead* to recover certain interest which he either received or *might* have received in the prior action. Clearly, in such a case, he states himself out of court, and shows on the face of the complaint not only that it does not state facts sufficient to constitute a cause of action, but that the subject-matter is such that *no court can acquire jurisdiction of it.* In a word, there is *no subject-matter*, any more than in a complaint that stated that two and two made four, and upon which alone the plaintiff claimed damages of defendant.

But aside from all jurisdictional questions, this court will not, it is submitted, sustain *on error* any judgment rendered in any cause, where it is clear, as in this case, that the complaint does not state facts sufficient to constitute a cause of action, whether issue has or has not been joined in the court below on such insufficient allegations; and this question is always in order in any stage of the proceedings, either in an inferior or appellate court.

"A writ of error always brings up to the Supreme Court the whole record of the proceedings in the court below. And in the case of The United States *v.* Smith, (11 Wheaton, 172,) this court said that the case being brought up by writ of error, the whole record was under the consideration of this court."

Dred Scott *v.* Sanford, 19 How., 403.

Error will lie where a court has exceeded its jurisdiction.

Wilkes *v.* Lyons, 3 Penna., 98.
Jordan *v.* Dennis, 7 Met., 590.
Waters *v.* Randall, 8 Met., 132.

Want of jurisdiction may be shown at any time.

Slocum *v.* Pomery, 6 Cranch, 221.
Carlisle *v.* Weston, 21 Pick., 535.
Kennedy *v.* Terrell, Hardin, 490.
Bents v. Groves, 3 McCord, 280.
Taylor *v.* Philips, 3 East., 155.
Roberts *v.* Monkhouse, 8 East., 547.

It was held in Jordan *v.* Dennis, 7 Metcalf, *supra*, that a plaintiff against whom a judgment was rendered in the court below could maintain a writ of error to reverse it on the ground that the court to which he had resorted had no jurisdiction.

The court, Chief-Justice Shaw, said:

"It may seem on the first suggestion that the law would depart from its usual rules of action in allowing a party to take advantage of his own wrong, and reverse a judgment for an error which he himself has committed in bringing his suit in a court having no jurisdiction. But without stopping to consider how far this consideration would apply to *other species of error* we think that whatever *other defects may be waived*, consent cannot give jurisdiction where the law has not given it, and that a writ of error will lie in this case at the suit of the party who commences the

action to reverse a judgment against him if the justice had no jurisdiction."

2 Saunders, 47, note (8).
Capron *v.* Van Noorden, 2 Cranch, 126.
Striker *v.* Mott, 6 Wend., 465.
Yelv., (Amer. Ed.,) 107, note.

MERGER.

This action is based on a certain covenant in the mortgage or deed of defeasance; it is brought to recover damages sustained by reason of an alleged failure on the part of Goldsmith to perform such covenant; and yet the complaint shows that this mortgage, including all deeds and defeasances constituting it, were, before the commencement of this action, *merged, swallowed up*, in a decree of foreclosure, and hence *functus officio*, and cannot be the *subject* of action.

Judgment or decree of foreclosure of a mortgage *merges* the mortgage.

Ferris *v.* Cravens, 65 Ind., 262.
Freeman on Judgments, 2d ed., sec. 215.
William Foster *v.* Estate of James F. Rhodes, 10 National Bankruptcy Reg. Rep., 523.

See extracts from opinions of Justices Benedict and Hunt in this cause, on page 46 of this brief.

In the case of Ferris *v.* Cravens, *supra*, the court said:

"In our opinion the judgment of foreclosure *merged* and *extinguished* the mortgage, so that no action could thereafter be brought upon it."

And proceeding further the court, quoting from Freeman on Judgments, said:

"A recent writer says 'the cause of action can never again become the basis of a suit between the parties. It has lost its vitality, it has expended its force and effect; all

its powers to sustain rights and enforce liabilities has terminated in the judgment or decree. It "is drowned in the judgment," and must henceforth be regarded as *functus officio.*'"

A judgment upon a joint contract against one only of three defendants merges the instrument on which the action is founded, and is a bar to any subsequent action on such instrument.

Woodworth *v.* Spoffords, 2 McLane, 168.
Sedan *v.* Williams, 4 McLane, 51.
Crosby *v.* Jeroloman, 37 Ind.

"A party who has failed to assert and litigate a claim or allowance in a suit in which he might with propriety have done so, will not be permitted to litigate it in a second suit, unless his failure to do so in the first was caused by the fraud of his adversary, and not by his own negligence."

Burford *v.* Kersey, 48 Miss., 643, (1873.)

Section 914, U. S. Revised Statutes, provides:

"The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the Circuit and District Courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such Circuit or District Courts are held, any rule of court to the contrary notwithstanding."

Section 76, page 119, General Laws of Oregon, provides as follows:

"The defendant may demur to the complaint within the time required by law to appear and answer, when it appears upon the face thereof either—

1st. *That the court has no jurisdiction of the person of the defendant, or the subject of the action;* or,

2d. That the plaintiff has not legal capacity to sue; or,

3d. That there is another action pending between the same parties for the same cause of action; or,

4th. That there is a defect of parties plaintiff or defendant; or,

5th. That several causes of action have been improperly united; or,

6th. *That the complaint does not state facts sufficient to constitute a cause of action;* or,

7th. That the action has not been commenced within the time limited by this code. * * *

SEC. 70. If no objection be taken, either by demurrer or answer, the defendant shall be deemed to have waived the same, *excepting only the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action.*"

It is respectfully contended that in view of section 914 of the U. S. Revised Statutes, *supra*, and the Oregon Statutes just quoted, the defendant cannot be deemed to have waived his right to object in this court on either of the two grounds:

1st. That it appears from the complaint that the court below had no jurisdiction of the *subject* of the action; or,

2d. That the complainant does not state facts sufficient to constitute a cause of action.

If the *practice, pleadings, and forms of proceeding*" * * "in the circuit courts" * * "*shall conform*" * * "to the *practice, pleadings*, and forms and modes of proceeding existing at the time in *like causes* in the courts of record of the State, &c., * * *any rule of court to the contrary notwithstanding*," then it follows that the *same effect* must be given by the Circuit Court to such "*pleadings and practice*" as are given either by the express provisions of the *State Statute* or the decisions of the *State Supreme Court.* Here the State Statute expressly provides that a failure to take these two objections, either by *demurrer* or *answer*, is not to be deemed a waiver of right to urge those objections at any time; *a fortiori* may it be said in giving construction to this statute, a pleading over after a decision on a demurrer is no waiver of this right.

Bowen *v.* Emerson, 3 Oregon Rep., 452.

But aside from all statutes or State practice, if the complaint does not state a good cause of action the judgment will be reversed, though no objection be taken in the court below.

Russell *v.* Ford, 2 Cal., 86.
Russell *v.* Meyer, 39 Cal., 504.
Russell *v.* Meyer, 42 Cal., 479.
Larthe *v.* McDonald, 7 Kans., 254.
Moore *v.* Wade, 8 Kans., 380.
Moody *v.* Crellins, 16 Kans., 419.

It was held by this court (opinion by the Chief Justice) in the case of McAllister *v.* Kuhn, 96 U. S. Rep., 87, as follows:

"Upon a writ of error to reverse a judgment by *default*, such defects in the declaration or complaint as *could* have been taken advantage of before judgment by general demurrer may be brought under review.

"If the judgment would have been arrested on motion because the declaration did not state facts sufficient to constitute a cause of action, it may for the same reason be reversed upon error."

It is respectfully suggested that a defendant who has been duly summoned, and who fails to appear and demur, or move in arrest of judgment, should occupy no *better* position in this court than he who appears and demurs, but on being overruled, pleads over.

It is respectfully submitted that the doctrine asserted in the several cases of Clearwater *v.* Meredith, 1 Wallace, 42; Aurora City *v.* West, 7 Wallace, 92; Young *v.* Martin, 8 Wallace, 354; Campbell *v.* Wilcox, 10 Wallace, 422; Railroad *v.* Harris, 12 Wallace, 84, and some others, can have no application to this case, or to any case where the objection is either to the jurisdiction of the court or the sufficiency of the complaint.

The central question involved in this case, and which goes to the right of the plaintiff in the court below to recover, is raised by the demurrer to the complaint—that is, that the complaint does not state facts sufficient to constitute a cause of action.

What is the proposition of the complaint? In the form of an inquiry it may be briefly stated thus:

Can a mortgagee, or, to be technically accurate, the *cestui qui trust* of a mortgagee, after foreclosure and sale of the mortgaged property, and the application of the proceeds of such sale in part payment of the debt secured by the mortgage, and where, pending such foreclosure suit, no receiver was asked for nor appointed to receive the rents of the property and subject them to the lien of the mortgage; nor any order of the court asked or made in reference thereto, and no entry ever having been made by the mortgagee for condition broken, maintain an *action at law*, either assumpsit or trespass *quære clausum fregit*, against his co-tenant in common, to recover rents received by the purchaser of the equity of redemption, between the dates of demand for possession after condition broken and the final surrender of possession?

The whole theory of this action, whether called assumpsit or trespass or covenant, (and it is somewhat difficult to determine from the complaint which it was intended to be,) is based on the proposition involved in the foregoing question.

It is respectfully submitted that there can be *no* recovery in such a case, and that therefore the court erred in overruling the demurrer to complaint.

It is to be regretted that the pleadings in this cause, both complaint and answer, are not more specific and certain in disclosing *precisely* and *affirmatively* what has been

done, and *all* that has taken place by way of enforcement of plaintiff's mortgage lien, and that so much is left to be gathered inferentially from what *is* stated.

THE COMPLAINT.

It is respectfully submitted, however, that a fair construction of the complaint justifies, among other material conclusions, the following:

1st. That *prior* to the commencement of this action the plaintiff Walker and his trustee Hewett had, in conformity with the statutes of the State of Oregon, instituted a suit in the courts of that State for the purpose of foreclosing their mortgage, had prosecuted it to final decree, that execution had issued on such decree, and all the property included in said mortgage, except certain portions that had been previously sold, had been sold, and the proceeds applied to their full extent to the partial extinguishment of the note secured by such mortgage.

This in fact, it may be said, is specifically, affirmatively averred in the complaint. From the complaint, on printed page 9 of record, we read: "That by reason of defendant's refusal to surrender the possession of said lands to said Hewett this plaintiff was obliged to and *did institute a suit against defendant and others to enforce the sale of said lands and to make his money out of the same, and in employing counsel and procuring a sale of said lands* he was obliged to expend and pay out the sum of $3,000;" and again on page 10 of Printed Record:

"*That all the lands which plaintiff held as security for his said demands against said B. Goldsmith have been sold, either in accordance with the terms of said agreement or by decree of court, and the entire sale realized only* $———."

While in the replication it is averred that it was necessary for plaintiff to institute a suit or proceeding to "*foreclose his lien upon said lands.*"

And in this connection attention of the court is attracted to the case of James D. Walker and Henry Hewett, respondents, *v.* B. Goldsmith and wife, and Joseph Teal and wife, appellants, in the Supreme Court of the State of Oregon, decided at the January term of that court, 1879. (This action was commenced August 5th, 1880. See Complaint, Record, 10.)

7 Oregon Reports, p. 161.

Showing full and *final* foreclosure proceedings and decree under suit commenced September 26, 1877, less than three months subsequent to the date of alleged demand, and of which record and proceedings this court will take judicial knowledge, and in its light give construction to plaintiff's complaint.

Section 697 Oregon Code provides, among other things, that courts "shall take judicial knowledge of * * 3rd. Public and private official acts of the legislative, executive and judicial departments of this State and the United States."

2d. That at no time during the pendency of such foreclosure proceedings did the complainants in that suit move the court for the appointment of a receiver, or request any order of the court in reference to the rents, issues, or profits of the lands covered by the mortgage, nor was any receiver ever appointed or any such order made.

3d. That the final decree of the State court in said foreclosure suit did not attempt in any manner to control, to complainant's benefit, the rents, issues, or profits of the lands accruing at any time *prior* to the date of such decree.

These two conclusions last stated are directly and necessarily to be inferred in giving construction to the complaint from the affirmative averment that Teal, from July

6th, 1877, "held possession of said south half of lots 2 and 7 in block 39, in the city of Portland," * * * * and the undivided half of the north half of lot 6 and the undivided half of the south half of lot 7 in block 2, and "*collected the rents thereof*" until November 30, 1878, and that he held the possession of said *farms* and *collected the rents thereof from July* 6, 1877, *until November*, 1879, thus covering the *whole time* from *prior* to the date of the commencement of the foreclosure suit until after final decree in that suit.

(Record, 9.)

If during all this time Teal was, as is alleged, in possession of these lands, and *receiving the rents thereof*, then manifestly no order of the chancellor was ever made pending the foreclosure proceedings for the purpose of controlling such possession and rents in the interest of complainants, or subjecting them to the lien of the mortgage; and if such order were invoked, it was refused by the court; and in either case the *fact* is highly pertinent in determining the rights of the parties in this action, and especially in determining the question whether the complaint states facts sufficient to constitute a cause of action.

It is further clear from the complaint—

4th. That there is no averment in the complaint that either Hewett or Walker ever made a demand for the possession of the *particular lands* or interest included in the trust deeds, and which were conveyed by Goldsmith and wife to Teal in April, 1877. And which lands, or the rents of which, are *alone* involved in this action, (excepting as to the south half of lots numbered 2 and 7, in block numbered 39.) The averment is that on July 6, 1877, "Hewett demanded from defendant the possession of *all said lands* in pursuance of the provisions of said contract." That is to say, all the lands included in the trust deed, as well those conveyed by Teal and wife to Hewett as

those conveyed by Goldsmith and wife to Hewett; whereas the demand *should have* been only for the possession of the *undivided one-half* of all lands included in the trust deed or mortgage, except as to the south half of lots 2 and 7, in block 39, aforesaid, the title to all of which was in Goldsmith.

(Complaint, Record, 9.)

The alleged proof of demand (see bill of exceptions, Record, 38) confirms this as the construction plaintiff *intended* should be placed on his *averment of demand* in complaint. The notice served, according to this evidence, reads as follows:

* * * "I therefore demand the possession of *all the lands, and of every parcel thereof, conveyed to me* (Henry Hewett) *by yourselves* (Joseph Teal and B. Goldsmith) *and your respective wives by your joint deeds*," *&c., &c.*

(Record, 30.)

It further must be borne in mind that according to the complaint the averment is—

5th. That during the whole time covered by the claim of plaintiff in the court below, the plaintiff and defendant, according to the plaintiff's theory, were *tenants in common*, or seized as such of the lands, the rents of which are sought to be recovered in this action.

6th. That while the defeasance of date August 19th, 1874, provides that on default of payment being made as per stipulation, Goldsmith and Teal "will and shall *on demand* peaceably surrender to said Hewett or his representatives or successor in said trust the possession of all said lands, &c," there is an entire absence of any such provision in the *second* defeasance of date October 18th, 1876, and in this respect there is a conflict between the two; and by the terms of the latter the two instruments are

"to be taken and construed together," *excepting in so far as they conflict with each other.*

(Record, 9.)

7th. That there is no averment that prior to the commencement of this action the plaintiff has at any time made any demand of defendant for the payment to him of the rents for which this action is brought, or any part thereof.

Point II.

The laws of the State in which land is situated control exclusively its descent, alienation, and transfer, and the effect and construction of instruments intended to convey it; all such laws in existence when a contract in regard to real estate is made, including the contract of mortgage, enter into and become a part of such contract.

Brine *v.* Ins. Co., 6 Otto (96 U. S. Rep.), 628.

In the case just cited this court, opinion by Mr. Justice Miller, said:

"All the laws of a state existing at the time of a mortgage or any other contract is made which affect the rights of the parties to the contract, enter into and become a part of it, and are obligatory on *all courts which assume to give remedy on such contracts.*"

The rights of the parties, therefore, in the case at bar must be determined by a construction of their contracts in the light of the Statutes of Oregon, as all these deeds and defeasances were made in the State of Oregon, and had reference to lands lying in that State.

Upon this point reference is made to the case of Russell *v.* Ely *et al.*, 2 Black, U. S. Sup. Ct. Rep., p. 575—Error to the U. S. District Court for the District of Wisconsin.

The syllabus of that case is as follows:

"1st. In Wisconsin the fee of mortgaged premises rests in the mortgagee, or assignee, *only* after foreclosure and sale, *not* upon the mere default of the mortgagor."

"2d. A deed in fee executed by the mortgagor, subsequent to the mortgage deed, but *prior* to the foreclosure, passes the legal title."

The Supreme Court of the United States, in the opinion in this case, (Mr. Justice Miller speaking for the court,) say:

"Numerous authorities from English and American decisions are cited by counsel on both sides in reference to this point," (that is, that the mortgage passed the legal title,) "but in the view we take of the matter they become of little value, *except those of the Wisconsin court. These deeds were both made in Wisconsin in reference to lands lying in that State, and in their construction must be governed by its laws.* The Revised Statutes of Wisconsin, chap. 141, sec. 28, enact that 'no action of ejectment shall hereafter be brought by a mortgagee, or his assigns, or representatives, for the recovery of the possession of the mortgaged premises until the equity of redemption shall have expired;' while chapter 154, sec. 11, provides that 'in every case the mortgagor may retain full possession in trust for the mortgagee, or purchaser, of all premises mortgaged by him, until the title shall absolutely vest in the purchaser of such mortgaged premises, according to the provisions of this chapter.'

"The Supreme Court of Wisconsin in the case of Wood and Moon *vs.* Trask, (7 Wis. R., 512,) speaking of these provisions, and perhaps others *in pari materia*, says:

"'Our statute has essentially changed the rule of the common law in relation to the position of the fee of the mortgaged premises after conditions broken.

"'The fee does not vest upon default of the mortgage in the mortgagee or his assignee. The fee *only* vests upon sale and foreclosure.'

"In Tallman *v.* Ely, (16 Wis. Rep., 257,) the same court says:

"'Our statute provides that the mortgagee shall not bring his action of ejectment before foreclosing the equity of re-

demption, (sec 53, chap. 106;) or, in other words, he must complete his title before he shall be permitted to recover at law on the strength of it.'

"These expositions of the statute of Wisconsin are to be followed by the Federal courts as rules of construction, and from them it results that the legal title did *not* pass to Floyd P. Baker by the mortgage deed of July 23d, but *did* pass to Clifford A. Baker by the deed in fee made the day after."

Russell *v.* Ely *et al.*, 2d Black, 575.

The statutes of the various States are not uniform in reference to the *estate* or interest the mortgagor and mortgagee have respectively in the land mortgaged. In a few States, and only a few, the fee is declared to be from the date of the mortgage in the mortgagee; while in most of the States, including the State of Oregon, the *fee* remains in the mortgagor, and a conveyance of the property mortgaged by the mortgagor carries with it the fee to the purchaser; while *all* agree that a mortgage creates no *interest in real estate*, but is simply a *lien on it* as security for debt or obligation.

THE OREGON STATUTE RELATING TO MORTGAGES.

The General Laws of Oregon, 1843–1872, title I, chapter 4, sec. 323, page 177, provides as follows:

"A mortgage of real property shall not be deemed a conveyance so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale according to law."

While title 4, chap. 5, page 196, sec. 410, reads thus:

"A lien upon real or personal property, other than that of a judgment or decree, whether created by mortgage or otherwise, shall be foreclosed and the property adjudged to be sold to satisfy the debt secured thereby by a suit. In such suit, in addition to the decree of foreclosure and sale, if it appear that a promissory note or other personal obligation for the payment of the debt has been given by the

mortgagor or other lien debtor, or by any other person as principal, or otherwise, the court shall also decree a recovery of the amount of such debt, against such person or persons as the case may be, as in the case of an ordinary decree for the recovery of money."

Point III.

Constructon of the Statutes of Oregon relating to Mortgages, by the Courts of Oregon.

The Supreme Court of the State of Oregon, in the case of Anderson *v.* Baxter, 4th Oregon Rep., 110, say:

"Formerly a mortgage of real property was regarded as a conveyance of the legal title, subject, of course, to be defeated by the performance of a condition, and this doctrine still prevails to some extent. Courts of equity, however, have always regarded a mortgage as a mere security for a debt, and the foreclosure thereof as a proceeding to satisfy the debt secured thereby; and courts of law, as well as courts of equity, in many of the States, have taken the same view; that is, that a mortgage was a mere lien or pledge, and that the general title to the mortgaged property was in the mortgagor. In the language of one of the authorities, 'the mortgagee has neither a *jus in re* nor *ad rem*, but a specific lien, similar in character to a general lien created by a judgment upon the land of the judgment debtor.'" (3 Denio, 232.)

Anderson *v.* Baxter, 4th Oregon Rep., 110.

Speaking further as to the effect of possession by the mortgagee of the mortgaged premises, the court said:

"The view I take is, that a mortgagee, or his assignee in possession, in a suit to foreclose the mortgage, occupies no more favorable position than if out of possession; that his right to maintain possession under a mortgage, when he has lawfully acquired it—if he has such right—does not depend upon his having a remedy to foreclose the mortgage."

Anderson *v.* Baxter, 4 Oregon, 113.

In Roberts *v.* Sunderland (4 Oregon, 222) the question was whether a mortgagee in possession, and to whom possession had been *actually delivered* voluntarily by the mortgagor, could retain the possession until the debt secured by the mortgage was paid. The court held he could, but said:

"It is true that under our code (Civil Code, sec. 323) a mortgagor cannot, against his will, be divested of his possession of the mortgaged premises, even after default, without a foreclosure and sale." * * * *

Judge Comstock, in Kortright *v.* Cady, 21 N. Y., 365, in speaking of the modification of the common law rule on this subject, says: "When the Legislature, by express enactment, denied this remedy to mortgagees (the right to eject the mortgagor after condition broken,) they undoubtedly supposed they had swept away the only remaining vestige of the ancient rule of the common law which regarded a mortgage as a conveyance of the freehold."

This exposition of the law of mortgages in Oregon has also been sanctioned by the Circuit Court of the United States for the district of Oregon.

That court, the district judge presiding, in the case of Witherell *v.* Wiberg, 4 Sawyer, 236, in reviewing the principles applicable to mortgages generally, both at common law and under statutes, as administered in courts both of equity and law, said:

"At common law a mortgagee in fee of land is considered as absolutely entitled to the estate, subject to its being defeated by the grantor's performance of the condition in his deed, as the payment of a sum of money in a prescribed time and manner, and also, if so provided, to the grantor's right to occupy until a failure to perform the condition. But upon such failure the mortgagee at once becomes the absolute and unconditional owner of the estate. (4 Kent, 154; 1 Wash. St., 510.) But this doctrine was long since modified by the courts in equity. In Osborn *v.* Scarf, (1 Atk., 603,) Lord Hardwicke laid down a rule

that the mortgagor in possession was the owner of the land; and in King *v.* St. Michael's, (1 Doug., 602,) Lord Mansfield held that the mortgage was only a security, saying: 'It is an affront to common sense to say the mortgagor is not the real owner.' The doctrines of equity on this subject have been generally recognized by courts of law, so that a half century ago Chancellor Kent could exultingly say:

"'The case of mortgages is one of the most splendid instances in the history of our jurisprudence of the triumph of equitable principles over technical rules, and the homage which those principles have received by their adoption in the courts of law." (4 Kent, 158.)

At this day in some of the States, notably New York, Wisconsin and California, the equitable doctrine has been followed to its logical results, so that a mortgage is there considered a mere chose in action, a security for the debt, while the mortgagor is considered the owner of the premises, subject only to the lien of the mortgage until a foreclosure and sale. (Jobin *v.* Willard, 4 Johns., 42; Runyon *v.* Merserau, 11 Johns., 578; Waring *v.* Smith, 2 Barb. Ch., 135; Jackson *v.* Bronson, 19 Johns., 325; Gardner *v.* Heart, 3 Denio, 234; Kortright *v.* Cady, 21 N. Y., 363; Trim *v.* Marsh, 54 N. Y., 603; 4 Kent, 157; Russell *v.* Ely, 2 Black, 576; McMillen *v.* Richards, 9 Cal., 409; Fogarty *v.* Sawyer, 17 Cal.; Dalton *v.* Warsehouer, 21 Cal., 621; Keild *v.* Teeple, 22 Cal., 262; Blackworth *v.* Yoke, 33 Cal., 264.)

This result has been facilitated by the force of legislation, of which section 323 of the Oregon Civil Code is a substantial copy. It declares as follows:

"A mortgage of real property shall not be deemed a conveyance so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale according to law."

(Witherell *v.* Wiberg, 4th Sawyer, 236.)

Again, the same court in Semple *v.* Bank of British Columbia, 5 Sawyer, 101, used the following language:

"But what is called the equitable doctrine in regard to the rights of parties to a mortgage is now (March, 1878,) the law of this State. In Anderson *v.* Baxter, (4 Oregon Reports, 110,) and Roberts *v.* Sutherlin, (Id., 222,) the Supreme Court of the State held that a mortgage was a mere security; that, therefore, the mortgagor is the owner of the premises, and entitled to the possession thereof until a sale under a decree to enforce the lien of the mortgage. And this rule was followed by this court in Witherell *v.* Wiberg, (4 Sawyer, 232,) wherein it was held that prior to such sale the mortgagee could not, under any circumstances, hold the possession of the mortgaged premises for the satisfaction of his debt without the consent of the mortgagor."

Semple *v.* Bank of British Columbia, U. S. Circuit Court, district of Oregon, (Deady, judge,) 5 Sawyer, 101.

The modern books are full of cases in which these same doctrines are enunciated and applied; in none, however, more succinctly or clearly than by Mr. Justice Field in the case of McMillan *v.* Richards, (9 Cal., 409,) in the language following:

"The original character of mortgages has undergone a change. They have ceased to be conveyances except in form. They are no longer understood as contracts of purchase and sale between the parties, but as transactions by which a loan is made on the one side and security for its repayment furnished on the other. They pass no estate in the land, but are mere security, and default in payment of the money secured does not change their character."

"The first great object of a mortgage is, in the form of a conveyance in fee, to give to the mortgagee an effectual security, by the pledge or hypothecation of real estate, for the payment of a debt, or the performance of some other obligation. The next is to leave to the mortgagor, and to purchasers, creditors, and all others claiming derivatively through him, *the full and entire control, disposition, and owner-*

ship of the estate, subject only to the first purpose, that of securing the mortgagee."

1st Hilliard on Mortgages, page 137.

It cannot be said, therefore, as was said in reference to a case in Georgia, where under an exception in the statute the mortgagor was out of possession, (*in re.* Bennett, 12 National Bankruptcy, 264,) that the rights and remedies of a mortgagee under the laws of the State of Oregon, or the construction of mortgage contracts, are the same as at common law. On the contrary, these rights and remedies must be determined in the light and under the direction of the statutes just quoted, and of the construction placed upon them by the courts in the cases cited, *supra.*

And it is respectfully insisted that these statutes become a part of the contract of the parties, both as to the rights and remedies of the mortgagor and mortgagee; and the actual possession of the mortgaged premises can rightfully pass to the mortgagee in but *two* ways, to wit, by foreclosure and sale, and by the voluntary surrender of the mortgagor.

It is clear, moreover, that under the statutes of Oregon, in force when the contracts under consideration were made, any deed or contract, or writing, or any two or more writings taken together, which constituted or created a mortgage security, whatever may be the stipulations, will not vest the fee in the mortgagee, so as to enable him to recover possession of the property mortgaged without a foreclosure and sale, and hence it follows that:

Point IV.

The conveyances of Goldsmith, and Teal and Goldsmith to Hewett, of dates August 19th, 1874, and October 18th, 1876, and the writings of defeasance signed by Gold-

smith, Teal, Hewett, and Walker of the same dates, respectively, must be taken and construed *in pari materia* and as one writing, except wherein the latter defeasance conflicts with the former. And so construed *they constitute a mortgage*—nothing more, nothing less—from Teal and Goldsmith to Henry Hewett to secure the payment, principal and interest, when due, of Goldsmith's note to Walker for $100,000.

White Water Valley Co. *v.* Vallette, 21 How., 414.
Coe *v.* Johnson, 18 Ind., 218.
Coe *v.* McBrown, 22 Ind., 252.
Peugh *v.* Davis, 6 Otto, (96 U. S.,) 332.
Lanahan *v.* Sears, 12 Otto, (102 U. S. R.,) 318.

A deed, though absolute in form, which is in *fact* security for a loan, is a *mortgage* in contemplation of a court of equity.

Peugh *v.* Davis, 6 Otto, *supra.*

Mr. Justice Field said, in the opinion of the court, in case *supra:*

"It is an established doctrine that a court of equity will treat a deed absolute in form *as a mortgage* when it is executed *as security for a loan of money.* That court looks beyond the *terms* of an instrument to the *real transaction*, and when that is shown to be one of security and not of sale it will give effect to the actual contract of the parties. * * * This right (equity of redemption) cannot be waived or abandoned by any stipulation of the parties made at the time, *even if embodied in the mortgage.*"

If a transaction resolve itself into a security, whatever may be its form and whatever name the parties may choose to give to it, it is in equity a mortgage, and the parties cannot by any covenant or agreement limit the rights of the mortgagor or cut off his equity of redemption.

Flagg *v.* Mann et al., 1st Sum., Ct. Ct. R., 491.

When a deed was given with warranty and a defeasance that the grantor should have a reconveyance, if within 12 months he should pay the debt, although in the meantime the grantee had a right to sell the whole, or a part, of the property at a fixed price in payment of the debt, the deed will be considered a security.

Dow et al. *v.* Chamberlin et al., 5 McLean's Ct. Ct. Rep., 281.

Where a party on receiving an absolute deed covenants with his grantor to reconvey the lands when the money which it was given to secure shall be paid, both instruments must be taken together as constituting a mortgage.

Lanahan *v.* Sears, 12 Otto, (102 U. S.,) 318.

Notwithstanding what has been said, the court below, most strangely as it would seem, in irreconcilable conflict with the very life of the doctrines enunciated by the same court in the cases cited, proceeds to dispose of the case at bar by ignoring not only the Oregon statute, but all the more modern decisions of both English and American courts upon this general subject, and applies to the case the old, iron, unbending rule of the ancient common law. Going even to the extreme point of holding not merely that by these contracts, these deeds, and these defeasances, or, in other and more appropriate words, *this mortgage*, vested the legal estate, the fee in the mortgagee, entitling him at his option to the immediate possession and the rents and profits, but that by the terms of these contracts, of *this mortgage*, a *lease* from the mortgagee to the mortgagor of the premises was created for a definite period, to wit, until thirty days had expired after default of payment, and thus the relation of landlord and tenant between mortgagor and mortgagee was established and an estate created in the mortgagor, *not* on condition, and therefore requiring an entry for condition broken, but upon a *conditional limitation* —an agreement for the possession so long as the interest was

paid; a possession limited by that contingency, and the happening of which terminated *eo instanti* the mortgagor's right to the possession, requiring neither entry nor demand upon the part of the mortgagee or his *cestui que trust.*

(Opinion Judge Deady, Record, 17.)

Even were the learned judge not in error in his conception of the nature of the estate as to possession, which the mortgagor had under these contracts, or rather this mortgage, it will be shown later that he has misapprehended the remedy of the mortgagee in such case, and his rights, and those of the mortgagor in the premisses.

But that the court below was clearly in error in applying to this mortgage the absolute and unreasonable rule of the common law as construed by courts centuries ago, will now be demonstrated.

And in this connection and to this end it is respectfully submitted that under the modern decisions applicable to this character of contracts, and especially under the statutes governing when and where this mortgage was executed, the following propositions are applicable and should be applied.

POINT V.

1st. The plaintiff in the court below being a mortgagee, or the *cestui que trust* of the mortgagee, is *not* entitled to rent of the mortgaged premises until *after actual entry.*

Fitchburg Maf'g Co. *v.* Melvin, 15 Mass. Rep., 268.
Gibson *v.* Farley, 16 Mass. Rep., 280.
Wilder *v.* Houghton, 1 Pick., 87.
Mayo *v.* Fletcher, 14 Pick., 529.

2d. In the absence of any stipulation in the papers constituting the mortgage to the effect that Goldsmith, the mortgagor, should retain the possession of the mortgaged premises until condition broken, he and his assignee would have been entitled to retain such possession not only until

condition broken but until foreclosure and sale; consequently the stipulation to that effect was simply a stipulation that the mortgagor should in part enjoy what the *statute guaranteed to him*, in the absence of any concession from the mortgagee.

3d. While the mortgagor or any person under him is by the mortgagee *permitted to remain in possession*, and the mortgagee *omit to enter*, the mortgagor, and those who are in under him, are, in contemplation of law, taking the rents and profits *to his and their own account.*

1st Hilliard on Mortgages, page 137.

4th. The mortgagor is not accountable to the mortgagee for rents *before taking possession.*

1st Hilliard on Mortgages, page 137.

5th. Rents and profits actually received by a mortgagor in possession before an order of sequestration is made, cannot be recovered of him, and so of an equitable incumbrance.

1st Washburn on Real Property, 532.
Clark *v.* Curtis, 1st Gratton, 239.
Coote on Mortgages, 325.

Mr. Washburn says, (1st Washburn on Real Property, 549:)

"The mortgagor cannot be charged with the rents of the premises before the mortgagee shall have obtained *actual possession*, even though the premises are an inadequate security for the debt; and this extends to the grantee of the mortgagor, and includes rents accruing *after* the commencement of process to obtain possession."

1st Washburn on Real Property, 549.
Coote on Mortgages, 325.
Gibson *v.* Farley, 16 Mass., 280.
Hughes *v.* Edwards, 9 Wheaton, 489.
Grable *v.* McCullough, 27 Ind., 472.
Bank of Ogdensburg *v.* Arnold, 5 Paige, 38.
Edwards on Receivers, 360.
Hunter *v.* Hays, 7 Bissell Ct. Ct., 362.

"Property in lease being mortgaged, and the mortgagor becoming bankrupt, the mortgagee notified the tenant to pay rent to him, but it was paid to the assignees. The mortgagee then filed a petition that the assignees might be ordered to pay him the rent received. In dismissing the petition Lord Eldon remarked, that admitting the case of Moss *v.* Gallimore to be sound law, he had often been surprised by the statement that the mortgagor was receiving the rents for the mortgagee. A mortgagee never could in that court make the mortgagor account for the rent for the time past. There was no instance that a mortgagee, *per directum*, had called on the mortgagor to account for the rents. The consequence is that the mortgagor does not receive the rent for the mortgagee."

1 Hilliard on Mortgages, page 138.

Mr. Justice Miller, in Souter *v.* La Crosse Railway, 1 Woolworth Ct. Ct. Rep., page 85, says:

"This company, however, being the owner of the equity of redemption, are entitled to possession *until foreclosure.*"

6th. Where a mortgagee completes his foreclosure without intercepting the rents, *he cannot afterwards, on finding the property insufficient, have the rents applied.* Whatever rights to intercept the rents he may have had, *ceased with the completion of the foreclosure.*

William Foster *v.* Estate of James F. Rhodes, 10 National Bankruptcy Reg. Rep., 523.

In the case of Foster *v.* Rhodes, *supra*, the court, Judge Benedict, said:

"It has been here claimed that the petitioner has a specific lien upon these rents by the terms of the mortgage, which contains as part of the description the words 'together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging, and the reversions, remainders, *rents, issues, and profits* thereof.'

"This is the ordinary form of a mortgage; these words are intended simply to give a full description of the property. *They do not entitle the mortgagee to collect the rents, nor*

do they create a lien upon rents accruing and collected before the possession of the property passes away under foreclosure proceedings."

Mr. Justice Hunt, also sitting in the trial of this cause folllowed Justice Benedict in the following opinion, quoted in full:

"The petitioner insists that by virtue of his mortgage he became assignee of the rents under a lease made prior to the mortgage. I think the creditor can no more ask for an incident under this mortgage, such as the rents, than he can ask for the principal, *that is the land.* This mortgage and all rights and claims, incidental and collateral as well as direct and immediate, *are at an end. By the foreclosure every right or claim, in whatever form it existed, is terminated. If he ever had a claim to the rents, it was ended when the foreclosure was complete.* Judge Benedict's opinion is satisfactory to me. The order should be affirmed."

Without going further, this case might be submitted on the authority just quoted. If the doctrine here enunciated without hesitation or doubt (and it comes from judges eminent in the profession, one formerly and when delivering this opinion, a distinguished member of this court,) is correct, and if it is a fact, as it unquestionably is, that it appears from the complaint in this case (Record, 9, 10,) that *prior* to the commencement of this action the plaintiff had foreclosed his mortgage, obtained a decree, and all the property had been sold, then, in the language of Mr. Justice Hunt—

"*By the foreclosure every right or claim, in whatever form it existed, is terminated.*"

And further, in speaking of the effect of a foreclosure, decree and sale, the learned justice says:

"His mortgage and all rights and claims, *incidental and collateral* as well as direct and immediate, *are at an end.*"

In Astor *v.* Turner, 11th Paige's Chancery Rep., page 336, (decided 1845,) the Chancery Court of the State of New York held as follows:

"The holder of a mortgage which has become due, and where the proceeds of the mortgaged premises are not, or when they probably will not, be sufficient to pay his debt and costs, and where the mortgagor or other person who is personally liable for the deficiency is insolvent, may apply for a receiver to secure the rents and profits of the mortgaged premises which have not yet been collected. In this way he may obtain a specific lien upon the rents and profits to pay such deficiency or the anticipated deficiency; although he cannot call upon the owner of the equity of redemption in the mortgaged premises to *refund rents and profits* which the latter have collected or received before the mortgagee attempted to get a specific lien upon such rents and profits by the appointment of a receiver." (See Howell *v.* Ripley, 10 Paige's Rep., 43.)

In Clason *v.* Corley, 5th Sandford's Rep., page 452, (1852,) the Superior Court of the city of New York held:

"We think the law is well settled that the owner of the equity of redemption in lands mortgaged is entitled to the rents which became due to the period when the purchaser under the decree of sale becomes entitled to the possession of the lands. The interference by way of a receiver, in the instance of inadequacy of the security and insolvency of the party personally liable for the debt, does not impair the rule; it admits its force. Now, when does the purchaser become entitled to the possession? The practice of the Court of Chancery, continued by its successors, and the terms of the usual decree of sale, show that the purchaser under such a decree can demand possession only upon the production to the occupant of the master's (or sheriff's) deed, and a certified copy of the order confirming the report of the sale *after* it has become absolute."

In Noyes *v.* Rich, 52 Maine, 117, which was assumpsit to recover certain moneys received by the defendent, as earnings of the York & Cumberland Railroad, which he was

superintendent thereof, the action having been brought by a receiver of the road appointed by the court in a suit to foreclose a mortgage on the road, the syllabus reads as follows:

"Mortgagees are *not* entitled to the rents and profits of the estate received by the mortgagor while in possession."

"The receiver appointed in a suit in equity to foreclose a mortgage of a railroad *cannot* maintain a suit to recover earnings of the road accruing *before* his appointment."

In the above-cited case the court said:

"It will hardly be contended that while mortgagors remain in possession they can be compelled to pay the rents and profits of the property to the mortgagees. (Boston Bank *v.* Reed, 8 Pickering, 459; Mayo *v.* Fletcher, 14 Pick., 525.) And yet that is just what is attempted in the case at bar. No one had ever rightfully taken possession under the mortgage until it was done by the receiver in March, 1860. The money in the defendant's hands accrued from the earnings of the road *prior* to that time. The mortgage did not attach to it. Therefore it was not embraced in the subject-matter of the suit in equity, and the receiver was not entitled to it."

In the cases of Gilman et al. *v.* Illinois and Mississippi Telegraph Company, and Coykendall, garnishee, *v.* Same, 1st Otto, (91 U. S. Rep.,) page 603, from the Circuit Court of the United States for the district of Iowa, the former by appeal and the latter on writ of error, the facts were as follows:

In 1857 the Des Moines Valley Railroad Company, by its then corporate name, in order to secure the payment of its bonds, executed to certain trustees a mortgage of its road, property and franchises, "*together with the tolls, rents and profits to be had, gained or levied therefrom.*"

The terms of this mortgage in regard to the possession of the premises in cause of default, it will be seen are almost *identical* with those in the mortgage under consideration, and for this reason indulgence is claimed for making so extended a reference to it.

One of the provisions of this mortgage was as follows:

"It is hereby further provided that until failure to pay the interest on said bonds, or to pay the principal at maturity, or to apply, appropriate, set apart, and deposit the several sums of money to be applied, appropriated, set apart, and deposited as hereinafter provided, the said party of the first part shall have the sole right to the possession, use, management, and control of the said mortgaged property and premises and of the receipts and revenues thereof as if this instrument had not been made; but if the said party of the first part shall fail to pay or cause to be paid the principal of the said bonds, or any of them, at the maturity thereof, or shall fail to pay or cause to be paid the interest on the said bonds, or any of them, or any part thereof, on any day whenever the same is made payable by the terms of the said bond, and the same shall remain unpaid for the space of six months after having been demanded, whereby at the option of the holders of one-third in amount of all the outstanding unconverted and unredeemed bonds, the principal sum secured thereby shall become immediately payable, or shall fail to apply, appropriate, set apart, and deposit the several moneys required to be applied, appropriated, set apart, and deposited, as hereinafter provided, then and in that case it shall be lawful for the said parties of the second part, their survivor or successor or successors, and it shall be their duty, to enter upon and take possession of all and singular the property, premises, and franchises hereby granted and conveyed, or so expressed or intended to be, and by themselves, or their agent or agents, substitute or substitutes, duly constituted, have, use, operate, and employ the same, making, from time to time, all needful repairs, alterations or additions, collect and receive all the tolls, rents, or profits to be had or gained therefrom, and apply all the moneys arising therefrom to the payment of the interest due and to grow due on all the said bonds which may be outstanding, unconverted, and unredeemed,

and to the payment of the principal of all and each and every of such bonds when such principal shall become due and payable."

In 1868 the company executed a *second* mortgage to certain other trustees, in which was conveyed the road with its appurtenances, and—

"Also *all rents, issues, incomes, tolls, profits, currency, moneys, rights, benefits, and advantages derived or to be derived, had or received therefrom by said company in any way whatever.*" * * * To have and to hold the above granted and bargained premises, with the appurtenances thereof, unto the said trustees, and to the survivors and survivor of them, and to their and his successors and successor, and their and his assigns, in trust, and upon the trust, uses and purposes hereinafter expressed, of and concerning the same, for the use and benefit of the person or persons, firm or firms, bodies politic or corporate, who shall hereafter at any time become the purchasers or holders, owners or bearers, of any or either of said bonds, subject to the terms, provisions and stipulations in said bonds contained, and also *subject to the possession and management of said railroad and property by said company* and its successors and assigns, *so long as no default* shall be made in the payment of either interest or principal of said bonds, or in any or either of them, or in payment of the amount of money as is herein provided for the sinking fund, and so long as the said company shall well and truly observe, keep, and perform all and singular the covenants, agreements, conditions and stipulations in said bond, and in this indenture conditioned and set forth, and which are to be observed, kept and performed by and on the part of said company.

"And it is agreed, in case of the default of the payment of the semi-annual interest as above provided, that said trustees and the survivors or successors of them are hereby expressly authorized and empowered, upon the request in writing of a majority in interest of the owners or holders of said bonds, to enter into and upon, and to take actual possession of all the property, real and personal, rights, franchises and privileges of the premises hereby conveyed, and each and every part thereof, and by

themselves, or by their attorneys or agents, have, hold, use and enjoy the same, and from time to time make all repairs and replacements, and all useful alterations, additions and improvements thereto, as fully as the parties of the first part might have done before such entry, and to collect and receive all tolls, freights, incomes, rents, issues and profits of the same, and of every part thereof."

The trustees never took possession, but default having been made in the payment of interest on *both* mortgages, the trustees in the *second* mortgage in July, 1872, commenced suit to foreclose in one of the State courts, making the railway company, the trustees in the *first* mortgage, and various judgment and lien creditors of the company parties defendant, and among others the Illinois and Mississippi Telegraph Company. No receiver was applied for or appointed pending the foreclosure proceedings, except as hereinafter stated.

On May 31st, 1873, a decree of foreclosure was entered by the State court, fixing the priorities of the several parties, holding that the telegraph company's judgment hereinafter mentioned was a lien *subject to the mortgage in suit and to other specified liens.*

The decree ordered a sale of the mortgaged property, but as *originally* entered made no provision as to the possession or earnings of the road (which was still in the possession of the railroad company and operated by it,) between the date of the decree and the sale which the decree ordered.

On June 13th, 1873, the telegraph company issued execution on a judgment for $23,734.10 which it had on the 24th day of May, 1872, obtained against the railroad company in the Circuit Court of the United States for the district of Iowa, and garnisheed under the statutes of the State moneys in the hands of the agents and of the railroad company at its various stations, *received by them from the income and earnings of the road.*

June 20th, 1873, the trustees in the first and second mortgages filed their bill in equity in the United States Circuit Court against the telegraph company to enjoin the said proceedings upon the execution under its judgment. The bill was subsequently amended so as to make the Des Moines Valley Railroad Company a defendant, and a temporary injunction was prayed for and allowed.

On Sept. 9th, 1873, after a sale had been advertised by the sheriff the *State* court, on an application made to it by the trustees under the *first* mortgage, modified the original decree by appointing a "special receiver of all the income and earnings of the road" between the date of the decree and the sale to be made by the sheriff. This was done saving the rights of the telegraph company.

The special receiver took possession Sept. 15th, 1873. The sale by the sheriff under which the purchasers were let into possession took place Oct. 17th, 1873, and left a large amount of the mortgage bonds unpaid.

Between the date of the decree of May 31st, 1873, and Sept. 15th, 1873, when the special receiver took possession, the road was operated by the railroad company, and during this period the net earnings were $27,147.96. Coykendall, an agent of the company, who was garnisheed, had received $27,000 of this amount, and judgment in the suit at law was rendered against him for that amount.

The Circuit Court of the United States dismissed the bill of complainants, the trustees under the *two* mortgages, who sought to hold these earnings by virtue of the provisions of the mortgage, and the Supreme Court affirmed both judgment and decree.

Mr. Justice Swayne, in delivering the opinion of the court, said:

"The proceedings in the case at law having been held valid, the telegraph company is entitled to the fund in controversy, unless the appellants have shown a better

right to it. The question arises upon the mortgages. The civil law is the spring-head of the English jurisprudence upon the subject of these securities. Originally, according to that jurisprudence, mortgages of the class to which those here in question belong vested the fee, subject to be divested by the discharge of the debt at the day *limited* for its payment. If default was then made, the premises were finally lost to the debtor. In the progress of time more liberal views prevailed, and the debt came to be considered as the principal thing, and the mortgage only as an incident and security. In the present state of the law, where there is no prohibition by statute, it is competent for the mortgagee to pursue three remedies at the same time. He may sue on the note or obligation; he may bring an action of ejectment; and he may file a bill for foreclosure and sale. (1 Hill on Mortgages, 9, 62; Id., 104, 111; Andrews *v.* Sutton, 2 Bland, 665.)

"The remedy last mentioned was resorted to in the State court by the mortgagees in the second mortgage, those in the first having been made parties, and that mortgage thus brought before the court. The court, therefore, had full jurisdiction as to the rights of all the parties touching both instruments. It would have been competent for the court *in limine*, upon a proper showing, to appoint a receiver and clothe him with the duty of taking charge of the road and receiving its earnings, with such limit of time as it might see fit to prescribe. It might have done the same thing subsequently during the progress of the suit.

"When the final decree was made a receiver might have been appointed, and required to receive all the income and earnings until the sale was made and confirmed and possession delivered over to the vendee. *Nothing of this kind was done. There was simply a decree of sale. The decree was wholly silent as to the possession and earnings in the meantime.* It follows that neither during that period *was in anywise affected by the action of the court.* They were as if the decree were not. * * * *Nothing was done in the exercise of the right which the mortgages gave to the mortgagees to intervene and take possession.* We may, therefore, lay out of view also both these topics.

"This leaves nothing to be examined but the effect of the mortgages, irrespective of any other consideration.

"*A mortgagor of real estate is not liable for rent while in possession.* (2 Kent's Com., 172.) He contracts to pay interest, not rent."

In Chinnery *v.* Black, 3 Doug., 391, the mortgagor of a ship sued for freight earned after the mortgage was given, but unpaid. Lord Mansfield said: "Until the mortgagee takes possession the mortgagor is owner to all the world, and is entitled to all the profits made." * * * "If the mortgagees were not satisfied they had the remedy in their own hands, and could at any moment invoke the aid of the law or interpose themselves without it. They did neither. * * * Upon both reason and authority we think the appellants" (the mortgagees) "have no right to the fund in controversy."

Again, in the case of the American Bridge Co. *v.* Heidelbach, 4 Otto, (94 U. S. Rep.,) 799, the relief sought here *at law* was refused *in equity.* This court in that case (opinion by Mr. Justice Swayne,) said:

"The controversy in this case grows out of a mortgage executed by the Kansas and Missouri Bridge Company to the appellees, as trustees, to secure the payment of the principal and interest of certain bonds given by the mortgagor and described in the mortgage. Besides the bridge of the company, the mortgage included 'the rents, issues, and profits of said bridge, as far as the same are not required to pay the necessary expenses of keeping in repairs and operating said bridge,' which 'rents, issues, and profits,' it was declared 'are hereby pledged to the payment of said interest as it matures, and to the establishment of a sinking fund for the redemption and payment of the principal of said bonds, &c.' It was further provided that '*if the interest were in default for six months,* the trustees, upon the written request of the holders of one-half of the outstanding bonds, might take possession of the mortgaged premises, manage and operate the bridge, *and receive and collect all rents and claims due and to become due to the company.*' The interest upon the bonds being in default, the trustees on 25th November,

1874, filed their bill, wherein among other things they set forth that there was in the hands of the company a certain amount of money which *ought to be applied upon the mortgage*, and certain claims due to the company, the proceeds of which ought to be applied in like manner. The bill prayed an accounting. The appellant, the American Bridge Co., held a judgment for $15,435.88 against the Kansas and Missouri Bridge, upon which an execution had been returned *nulla bona*. On December 11th, 1874, the judgment creditor filed a bill claiming priority of payment out of the money and the proceeds of the claim above mentioned. It cannot be denied that the return of the execution, the filing of the bill, and the service of process gave the judgment creditor a lien upon the fund in question which must prevail *unless* the mortgagees have shown a paramount right to it. (Miller *v.* Sherry, 2 Wall., 249; 2 Barb. Ch., p. 157, note 13.) The question as to the right claimed by the trustees is conclusively settled against them by Galveston Railroad *v.* Cowdrey, 11 Wall., 459, and Gilman *et al. v.* Ill. and Missouri Tel. Co., 91 U. S. Rep., 603. Both these cases, as regards this point, present exactly the same legal aspect as the case before us.

"In this case, upon the default which occurred, the mortgagees had the option *to take personal possession of the mortgaged premises*, or *to file a bill, have* a receiver appointed, and possession delivered to him. In either case the income, *therefore*, would have been theirs. *Until one or the other* was done the '*mortgagor*,' as Lord Mansfield said in Chinnery *v.* Block, 3 Doug., 391, was 'owner to all the world and entitled *to all the profits made*.' The mortgage could have no retrospective effect as to previous income and earnings. The bill of the trustees does not affect the rights of the parties. It is an attempt to extend the mortgage to what it cannot be made to reach. Such a proceeding does not create any *new right*. It can only enforce those which exist already. The bill of the trustees is as ineffectual as if the fund were any other property, real, personal, or mixed, acquired by the mortgagor *aliunde*, and never within the scope of the mortgage."

The fund sought to be charged in the case just quoted was of the issues and profits, the income of the company, subsequent to condition broken; and although the terms of the mortgage included the "*rents, issues and profits of the said bridge,*" inasmuch as there was a provision in the mortgage that in case of default in payment the trustees *might* take possession, &c., and operate the bridge and receive and collect "*all rents and claims due and to become due,*" and as the mortgagee did not immediately on condition broken, either enter and take possession or foreclose, he could not therefore, even in equity, when bill was filed, claim the fund arising out of *prior* rents, issues and profits.

The two cases last cited were, in the terms of the mortgage, much more favorable to the mortgagees than are the terms of the mortgage contracts under consideration. In this latter there was no special attempt, as in the other two, to include in the property mortgaged, by specific terms in the mortgage, *the rents, issues and profits*, even *after* condition broken or default in payment; nothing of this kind, but simply in case of default the mortgagor was *on demand* not to pay rent, but deliver possession, and the mortgagee on default, in the language of the mortgage, "may *and shall proceed and take possession* of said lands, * * * and on their failure to pay shall sell the same," &c.

Point VI.

It is respectfully insisted that the several stipulations in the defeasances in regard to the rents and profits and the possession of said mortgaged premises, concluding (Record, 4,) with these words:

"But if the said Goldsmith shall fail to pay the above described promissory note, or the interest thereon, and default being so made, so that according to the tenor of said note the same shall be thirty days overdue, then said

Henry Hewett, or his successors in trust, may and shall proceed and take possession of said lands," * * * in the language of this Court in case Galveston Railroad Company *v.* Cowdry, 11 Wallace, 461, "*define and point out the manner in which the pledge of the tolls and income,*" (in this case the rents,) "*is to be practically carried into effect.*"

This court in the case just cited, (opinion by Mr. Justice Bradley,) said:

"Now what is the language of the deeds of trust? They convey, it is true, with the other premises, the tolls, income, issues, and profits, whenever the company shall be in default of payment; but a subsequent clause provides that in case the company shall at any time for the space of three months be in default in respect to the payment of either interest or principal of said bonds when due and demanded, on request in writing of any of the holders of the bonds, the trustees shall take possession of the railroad and other property, and through the agency of the persons they may appoint shall collect and receive the tolls, incomes, and profits of the railroad and mortgage property for the purpose of the security before declared, and may sell the road upon giving due notice, &c. *It seems to us that the latter clause defines and points out the manner in which the pledge of the tolls and income is to be practically carried into effect.* At all events until a regular demand were made *for the payment of the tolls and income*, we do not think under the language of the deed that the defendants were bound to account therefor. If this be so, it matters not what bargains the defendants made between themselves as to the disposition of the tolls and income."

If, in the case under consideration, the right of the mortgagee to the rents after default depended on a stipulation which also provides the *mode* in which they shall be received and applied, *that mode* must be pursued.

Ins. Co. *v.* Stebbins, 8 Paige, 565.
Astor *v.* Turner, 11 Paige, 436.
Mitchell *v.* Butler, 51 N. Y., 447.

In this case, however, by the very terms of the mortgage deeds, the mortgagor is, until condition broken, to receive the rents to his own use, while the agreement is silent as the grave in reference to the rents after that date; as by the express terms of the agreement, it was not only the right, but made the *imperative duty* of the mortgagee, the trustee, to take immediate possession of the lands, and sell the same and apply the proceeds to the extinguishment of the debt; and having failed to do this, the rents received subsequently to date of default by the assignee of the mortgagor, cannot be by any rule of either law or equity brought within the legitimate scope of the grappling irons of the mortgage deeds, any more than could any other property of the mortgagor not mentioned in the mortgage.

The Foreclosure Suit.

This point as to the *duty* of the trustee under the mortgage was determined by the Supreme Court of the State of Oregon in the foreclosure suit. (See case James D. Walker and Henry Hewett, respondents, *v.* B. Goldsmith and wife and Joseph Teal and wife, 7 Oregon Rep., 161.)

In that suit the defendants Teal and wife filed separate answers, in which they deny that Teal was ever personally bound for the debt as surety or otherwise, and aver the failure and neglect of Walker and Hewett to proceed according to the terms of the contracts to sell the trust property, and that Teal's property included in the mortgage was thereby discharged from all liability, &c.

The Supreme Court of the State unanimously sustained this view of the case; and although the court below had entered a decree against Goldsmith for $111,227.95 and the further sum of $2,500 for attorney's fees, and further decreed that the lands of Goldsmith *and Teal* described in the mortgage deeds be sold and the proceeds applied to the payment of the above sums, the Supreme Court re-

versed this decree in so far as it ordered a sale of the lands conveyed to Teal and wife to Hewett on August 19, 1874, and October 18, 1876.

The court, Chief-Justice Kelly delivering the opinion, said:

"We think that the neglect to sell the property conveyed within the time prescribed in the agreements of the parties discharged the property of Teal from all liability as security for the debt of Goldsmith to Walker, and that the trustee, Henry Hewett, should re-convey to Joseph Teal all the lands conveyed to him by Teal and wife on the 19th day of August, 1874, and the 18th day of October, 1876, * * * and the said Henry Hewett is hereby directed to re-convey the said lands to said Joseph Teal within three months from the date of this decree, upon the payment by said Teal of the reasonable fees for making such re-conveyance." (Walker *et al. v.* Goldsmith *et al.*; decided January Term 1879; 7 Oregon, 161.)

Point VII.

It is respectfully insisted the relation of landlord and tenant did not exist between plaintiff and defendant during the time covered by plaintiff's claim for rent. The parties, until the mortgagee made entry or foreclosed his lien, were adverse claimants to the same property, and the real question between them is the question of *title* at that time, which cannot be tried in an action of assumpsit. (3 Stark Ev., 1513; Codman *v.* Jenkins, 14 Mass., R. 96; Hildreth *v.* Thompson, 16 Mass., R., 191; Hernwood *v.* Sharswood, 3 Sergeant and Rowle; Smith *v.* Stewart, 6 Johns, R., 46.)

Nor will assumpsit lie against one man for use and occupation by another unless such occupation was permitted by the plaintiff upon the defendant's request. (Naish *v.* Tullock, 2 H. Bl., 323.)

Under the express agreement in the mortgage Goldsmith had a right to the exclusive possession, and might

lawfully transfer that right to defendant Teal, as also the equity of redemption, at any time before entry for condition broken. (1 Russell on Mortgages, Rand's Ed., page 155; Mersereon *v.* Runyon, 11 Johns. R., 534; Newell *v.* Wright, 3 Mass. R., 152.)

If Goldsmith or Teal, his assignee, was a tenant of the mortgagee *after* condition broken, then he was tenant only upon the *same terms*, as to rent, as *before* condition broken. *No new contract has been made*, and as it is conceded he was *not* responsible for rent *before* condition broken, it follows he is not liable *after* the happening of that event.

The insertion in the declaration of trust of a power to sell does not alter the nature of the instrument, or give any greater security than is implied in the word "mortgage." The power to sell applies solely to the remedy, and impairs no rights of the mortgagor that he would have were the power to sell omitted. (Wilson *v.* Troup, 2d Cowen, 195.)

The trustee could not have maintained an action of trespass against the assignee of the mortgagor for continued occupation after default.

Even at common law an action of trespass could not be maintained by a mortgagee before entry.

1st Smith's Leading Cases, Koch *vs.* Hall, 882.
Cameron's Coal Brook Steam Coal Co., 5 Exch., 932, S. C. L. J.

In Litchfield *vs.* Ready, 5 Exchequer, 988, it was held that a mortgagee could not *after entry* maintain trespass for *mesne* profits *before entry* against the mortgagor's tenant after mortgage.

See also Williams *vs.* Mattison, 4 Rhode Island, 539;
Mayo *vs.* Fletcher, 14 Pick., 530.

An action for use and occupation is founded upon a contract creating a tenancy. It will only lie where the relation of landlord and tenant exists between the parties. This is an established rule.

Dudding *v.* Hill, 15 Ill., 61.
McNair *v.* Schwarts, 16 Ill., 25.
Smith *v.* Stewart, 6 Johns., 46.
Pott *v.* Lesher, 1 Yeates, 576.
The City of Boston *v.* Binney, 11 Pick., 1.
Rogers *v.* Wiggs, 12 B. Monroe, 504.

Point VIII.

But assuming for the present, and for the purpose only of testing the validity of the argument of the court below, the correctness of the assumption that by the terms of the mortgage deeds between the parties, the legal title was in Hewett, the trustee, and that the agreement as to possession amounted to a *lease* to Goldsmith, the mortgagor, until such time as the promissory note should become due, and being overdue remain thirty days unpaid, still it is insisted the estate thus created in the mortgagor is not one upon a *conditional limitation*, but rather one as to the possession until such time as it shall become *merged* in the legal estate, by the payment of the debt, with a *condition subsequent* attached. It was, if as erroneously claimed by the court below, a grant of an estate at all, (and it was not, but simply one of the terms of the condition upon which these lands were pledged as a security for the payment of the note,) a grant of the possession, *not* for a limited time, but rather for all time, subject, however, to merger in the lessee's legal estate on payment of the debt, and to be defeated by a failure on his part to do a certain thing—perform a certain condition—to wit, pay the note when due; or, in other words, a grant of the possession until the lessee acquires the fee by the

payment of the debt secured by the mortgage, only liable, however, to be defeated by the mortgagor doing a certain thing, to wit, by making default in the payment of the note.

Assuming such to be the nature of the estate, the *right* of the mortgagor to the possession could only be determined by an entry on the part of the mortgagee under the terms of the mortgage, or by a foreclosure and sale, and until one or the other of these things occurred the mortgagor was entitled to receive the rents to his own use, free from any claim on the part of the mortgagee. The following authorities fully sustain this position:

In Mayo *v.* Fletcher, and Mayo *et al v.* Shattuck, 14th Pickering, page 530, the syllabus is as follows:

"Where a mortgagor of premises reserves in the mortgage a right to remain in possession until breach of the condition, and he holds over, *the law will not imply an assumpsit to pay rent to the mortagagee during the time of holding over and previous to an entry by the mortgagee*"

The facts were these:

The plaintiffs, Mayo *et al.*, sold defendant Shattuck certain leasehold property, gave him a deed of assignment indorsed on the indenture of lease. Half of the purchase money was paid by Shattuck on receiving the deed, and for the residue ($275.00) he gave his note to the plaintiff, payable in four months, and at the same time executed and delivered to them a deed of mortgage as collateral security for the payment of the note according to its tenor. By the terms of the mortgage Shattuck was to possess and occupy the premises *until* there should *be a breach of the condition.*

Shattuck soon after took possession and the defendant, Fletcher, by *permission* of Shattuck and as *his tenant,* occupied the premises from May, 1831, to the time of the trial. The note in question was not paid at its maturity, but soon afterward.

No formal demand of payment of the note was made. At the expiration of one month from the maturity of the note, the plaintiff demanded a *month's rent* of Shattuck. He refused to pay, and an action of assumpsit was brought against the plaintiffs to recover the month's rent. After notice to Fletcher to quit the premises, the plaintiff commenced an action of trespass *quare clausum fregit.* The plaintiff never entered into the premises or had the possession of the same after they became the mortgagees thereof. Fletcher had knowledge of the existence of the mortgage and its provisions before he had notice to quit, and that the note was unpaid at its maturity.

The court below held that neither the action against Shattuck for the rental value for the month ensuing the date of condition broken, nor the case of tresspass against Fletcher, his tenant, could be maintained; the plaintiffs were non-suited in both cases, and on error to the Supreme Court of Massachusetts the court affirmed the decision of the court below in both cases.

The court, (Putnam, Justice,) in delivering the opinion of the court in the two cases, which were heard together, said:

"The legal estate was in the mortgagees, but the effect of the agreement between the mortgagor and mortgagees amounted to a lease to the mortgagor for the four months. 1st Powell on Mortgages, (Rand's ed., 155.) The mortgagor did not pay the note on the day when it became due. * * * There is no doubt but that the mortgagees *after* breach of the condition might have lawfully entered; and if there had not been any such agreement to the contrary, they might have entered *before* the breach of the condition, or they might have maintained their writ of entry and recovered the possession without any notice to the mortgagor to quit. The mortgagor had less rights than a tenant at will would have had. He would not have been entitled to the emblements as a tenant at will would have been; but while the mortgagor, or any person under him, are by the mortgagees permitted

to remain in possession, and the mortgagees *omit to enter*, the mortgagor and those who are in under him, are in contemplation of law *taking the rents and profits to his and their own account.* So the mortgagor may sell the estate subject to the condition, and he may maintain trespass or entry *sur disseizin* against a stranger. Willington *vs.* Gale, 7 Mass. Rep., 138."

The court, proceeding, said:

"And the assignee of the mortgagor is not liable in trespass for the rents accruing *between the commencement of the action to foreclose and the time of taking possession upon execution.* (Wilder *vs.* Houghton, 1st Pick., 89.) In Mass *vs.* Gallimore, 1st Doug. 282, Lord Mansfield said: 'A mortgagor is not properly a tenant at will to the mortgagee, for he is *not* to pay him rent. He is only *quandum modo.*' * * * The mortgagor has a right to possession until the mortgagee brings his ejectment, *or* until entry by the mortgagee. (Key *vs.* St. Michaels, 2 Doug, 632.) Per Lord Mansfield, 'after the mortgagee has got into possession he might join a settlement,' but not before, although he has the legal estate."

The court, proceeding further in the trespass case, said:

"As to all the world except the mortgagee the mortgagor is considered as the owner of the land *until an actual entry made under the mortgage.*" (Groslin *vs.* Richardson, 11 Mass. R., 473.)

The court, in disposing of the case against defendant Shattuck for the month's rent for use of property *after* condition broken, said:

"It is contended on the part of the defendant that he as mortgagor was rightfully taking the profits, as the plaintiffs have not entered upon the premises for condition broken;" (precisely what the defendant Teal claims in this case,) "and on the part of the plaintiffs, that the property became absolutely vested in them upon the failure of the defendant to pay the note at its maturing," (precisely what the plaintiff Walker claims in the case at bar, and as the court below held, namely, that the estate of

Goldsmith was one not upon condition requiring re-entry on condition broken, but an estate upon a *conditional limitation*—a possession limited by a contingency upon the happening of which the mortgagee's estate became absolute and his right to the rents complete without an entry.) "The claim of the defendant is wholly adverse; for, if he is to be considered a mortgagor in possession *after* condition broken and before entry by the mortgagees, it is clear that he is *not* accountable for the rents. (Fitchhey Cotton Man. Corp. *vs.* Melven, 15 Mass. Rep., 268; Gibson *vs.* Farley, 16 Mass. Rep., 280; Wilder *vs.* Houghton, 1st Pick., 87.) The law will not imply an assumpsit under these circumstances. We refer to the cases cited by the counsel for plaintiff to that point, and to the City of Boston *vs.* Binney, 11 Pick., 1, which has been published since this cause was argued."

The case of The 50 Associates *v.* Howland, 11 Met. 101, cited by the court below in his opinion overruling the demurrer (Record 18) in support of the position that the mortgagor's estate was one upon a *conditional limitation*, and not upon *condition*, so far from sustaining the view adopted by the court, only serves to controvert and overthrow it.

In that case a lease for five years contained this clause:

"Provided always, and these presents are upon this condition, that if the lessee, or his representatives, shall neglect or fail to perform and observe any or either covenant which on his or their part is to be performed, then the lessor lawfully may immediately, or at any time thereafter, and whilst such neglect or default continues, and without further demand or notice, enter into and upon the said premises, repossess the same as of his former estate, and expel the lessee."

The lessee failed to pay the rent according to his covenant, and the lessor entered for condition broken, and the court held that this clause in the lease was a *condition* and not a *conditional limitation*, and that the lesssee's estate

was not determined by his failure to pay rent, but by the lessor's entry.

The court in its opinion, Wilde, Justice, said:

"The question, then, is whether the words of this proviso are words of condition or conditional limitation. The distinction is correctly laid down by Blackstone, as cited by the defendants' counsel: 'When an estate is so expressly confined and limited by the words of its creation *that it cannot endure for any longer time than till the contingency upon which the estate is to fail, this is denominated a limitation*—as when land is granted to a man *so long as* he is parson of Dale, or *while* he continues unmarried, or *until* out of rents and profits, he shall have made £500, and the like.' In such case, the estate determines as soon as the contingency happens, and the next subsequent estate which depends on such determination becomes immediately vested without any act to be done by him who is next in expectancy. But when an estate is, strictly speaking, on *condition in deed*, (as if granted expressly *upon* condition to be void upon the payment of £40 by the grantor, &c.,) the law permits it to endure beyond the time when such contingency happens, unless the grantor, or his heirs or assigns, take advantage of the breach of this condition and make either an entry or claim, in order to avoid the estate." (2. Bl. Com., 155.)

According to this distinction, which is fully supported by the authorities, it seems quite clear that the words of the proviso in the plaintiff's lease creates an estate on condition, and cannot be construed as words of limitation. The estate of the lessee was not to cease or become forfeited by his non-performance of the condition before the entry of the lessors, and if no such entry had been made the estate of the lessee would have continued until the end of the term. So if the lessors had after the breach of the condition by non-payment of rent, accepted the rent in arrear, it would have been a waiver of the forfeiture, after which the lessors could not enter for breach of the condition. * * * *No right is reserved to the plaintiffs*

except to repossess their former estate by entry after condition broken."

What, then, is the clear distinction, as stated by Blackstone, as well as by the court, in the case in 11 Metcalf, *supra*, and by all respectable authorities as well, that divides a *condition* in deed from a *conditional limitation*, and which so clearly distinguishes the one from the other? It is this: If the estate is so expressly confined and limited by the terms of its creation that it *cannot in the nature of things or as a physical possibility endure for any longer time than till the happening of the contingency upon which the estate is to fail*, then it is a *limitation*, and only then. Whereas if it be possible that for any reason growing out of the words employed in creating the estate, or by the acts of the parties under it, grantor or grantee, the estate *may* endure beyond the time of the happening of the contingency, then it is not an estate upon limitation, but condition. For instance, take the illustrations given by Blackstone and quoted by the court below to sustain his view that this was an estate upon a conditional limitation. (Record, 17, 18.)

"*When land is granted to a man so long as he is parson of Dale.*"

Now in such a case it is apparent that the estate *cannot by any possibility endure beyond the date that the grantee ceases to be parson of Dale.*

So if the grant be to him "*while he continues unmarried*," here the marriage of the grantee renders it a *physical impossibility* for the estate to *endure a moment beyond the moment of marriage.*

Or if the grant be "*until* out of the rents or profits he shall have made £500," it is clear that whenever the grantee shall have made the £500 out of the rents or profits, *that instant* the estate ceases; nothing that either

party can or may do under the old grant, or short of a new *contract*, will cause the estate to *endure* in the grantee beyond that time

But in the case under consideration, the nature of the mortgagor's estate—assuming for the present that he was the lessee of the mortgagee—is vastly different.

Said Teal and Goldsmith, or Goldsmith alone, were "to retain and have possession of and control over all the said lands, and enjoy and have, without account, the issues, rents and profits thereof until such time as the promissory note shall become due, and being overdue remain thirty days unpaid, and upon such default in payment being made, said Goldsmith, and Teal and Goldsmith, will and shall, *on demand*, peaceably surrender to said Hewett, or his representatives or successors in said trust, the possession of all said land, and every parcel thereof to to be by him disposed of, as herein provided." (Record 4.)

Here it is plain to be seen that it was clearly *possible*, for several reasons and on several contingencies, for this estate in possession to "*endure*," to use Blackstone's term, for a *longer time* than until the happening of the contingency upon which the estate, or the possession, was to fail. For instance, if the motgagee failed to make a *demand* on default as required, then the esate would "*endure*" beyond the default or the happening of the contingency, and the fact that this is *possible* makes it *impossible* as an estate upon a *limitation.*

Again, the payment of the note after default by Goldsmith, and its acceptance by Walker, as he would have been *bound to accept it if* tendered, would have been a *waiver* of the breach of the condition, and the estate would have *continued to endure*, and the *very fact* that this *could happen* renders the estate one *on condition,* and not one upon a *conditional limitation.*

Again, as stated by the court in the case in Metcalf, *supra*, "no right is reserved to the plaintiff except to

repossess their former estate by entry after condition broken." (Record, 4.) And the fact that it was in the power of the trustee to *waive* this right takes the estate necessarily out of the category of estates upon conditional limitation.

This being, then, in case the relation of landlord and tenant existed, (which is denied) an estate upon condition, it became necessary that there should be a re-entry on the part of the mortgagee or lessor. But granting that a demand for the possession and a refusal would entitle plaintiff to maintain an action for *mesne* profits, then the demand, being for the *whole* property, while the claim only covers the undivided one-half, is insufficient.

Hodgeborn *v.* Hall, 24 Ward, 148.
Brodshine *v.* Clark, 21 Pick, 293.
Prout *v.* Robey, 15 Wallace, 476.

Nor was there ever *any demand* for *rents* received by Teal as tenant in common with Walker; he had the right to the possession of all the lands, and before any action could be maintained against him a demand of the precise sum due and claimed should have been made on him. This was not done.

Mr. Justice Swayne said in Prout *v.* Robey, 15 Wallace, 476:

"This leaves the right of the parties to be determined by the common law.

"It is a well-settled rule at the common law, that where a right of re-entry is claimed on the ground of forfeiture for the non-payment of rent, there must be proof of a demand of the *precise sums* due, at a convenient time before sunset, upon the day when the rent is due, upon the land, at the most notorious place of it, though there be no person on the land to pay." In this case it is not shown that any demand was ever made upon the premises. * * * If the requirements of the law had been complied with, or if the appellant had enforced the for-

feiture by a recovery as essential upon tender of the amount due with interest and costs at the proper time, relief would have been given."

Point IX.

The 4th assignment of error should be sustained, to wit: that the court erred in overruling the objection of defendant to the admission as evidence of the paper signed by Henry Hewett and addressed to Joseph Teal and B. Goldsmith, bearing date July 3d, 1877, and referred to by the witness John Catlin, and copied in full in the bill of exceptions, (Record, 38,) and for the following reasons:

1st. There was no sufficient evidence that the paper was a duplicate original, the witness Catlin simply saying that "he *considered* them both originals"—the one said to have been served on defendant and the one offered in evidence.

2d. Because there was *no evidence* offered to show the loss or destruction of the paper delivered to the defendant, or to account for its non-production.

3d. No demand was made, or claimed to have been made, upon defendant for the production of the paper to be used at the trial.

4th. The paper on its face shows that the alleged demand for possession was *not* for the identical property covered by plaintiff's claim in this action, but also for the possession of an undivided interest in the same property, the title to and right of possession to which was and is conceded to be in defendant.

5th. Because there was no evidence offered showing, or tending to show, where this paper was served on defendant—whether on the lands, in the State of Oregon, in Washington city, or in Africa.

6th. Because it was immaterial.

Point X.

The 6th, 7th and 8th assignments of error will be considered together.

They relate to three several offers on the part of the defendant to submit in evidence to the jury on the trial certain certified copies of the assessment rolls of the counties of Benton, Polk and Linn, Oregon, for the years 1877, 1878 and 1879, as to Polk and Benton counties, and for the years 1877 and 1878 for the county of Linn, with the levies of taxes extended thereon, for the purpose of showing by the three separate offers the amount of taxes levied and paid on the lands in those counties severally upon these assessments, respectively, by the defendant Teal, during the time for which he is charged in this action for the rental value of said lands, included in the mortgage.

That there was manifest error on the part of the court below in these three separate rulings, sustaining plaintiff's objection to the introduction of this evidence, is confidently submitted.

This being an action by a mortgagee to recover from the assignee of the mortgagor in one action the rental value of certain lands included in a mortgage, although such lands lie in different parcels, for the time occupied by the defendant after default of payment, it is submitted that in determining the gross rental value and the gross amount expended for necessary repairs and legal taxes and assessments which the law deducts, the property should be considered as a *unit*—as *one piece or parcel of land.*

What was the exact status of the case when the defendant proposed to introduce this evidence?

1st. Evidence had been offered on the part of plaintiff, and had been received and submitted to the jury, tending to show the rental value of all the property, to wit, the lots in Portland, the farm in Benton and Polk counties, and the farm in Linn county.

2d. The plaintiff had proved and the defendant had admitted that the rents received by defendant from the lots in block 39, in Portland, during the period complained of, *exceeded the necessary* expenses of keeping the same in repair and the taxes thereon by a greater sum than $3,000, and that the rents received for the property in block 2, in Portland, during the period complained of, exceeded the necessary expense of keeping the same in repair and the taxes thereon by a sum greater than $2,400.

3d. The defendant had offered testimony, which had been received, tending to prove that the necessary *expenses* of keeping the farms in Benton and Polk and Linn counties exceeded the rental value of those farms during the period complained of.

4th. The defendant had offered his own testimony, which had been received, in which he testified: 1st, that the income of the lands in Linn, Polk, and Benton counties had never been equal to the cost of necessary repairs, and 2d, that he *had paid all the taxes assessed and levied upon the lands in Polk and Beuton counties* at the annual assessments and levies made in the falls of 1877, 1878, and 1879, and *all the taxes assessed and levied upon the lands in Linn county* at the annual assessments and levies made in the falls of 1877 and 1878, and that he paid all said taxes before the commencement of this action.

5th. The defendant did not state the amount of taxes so paid by him in any one year or in the aggregate, *nor was there any evidence upon that point.*

The above in brief was the state of the case before the jury when these offers were made respectively. Furthermore, it appears from the bill of exceptions (Record, 41, 42) that the amounts of taxes that these rejected records would have shown to have been levied and paid during the time covered by claim of plaintiff for mesne profits, were as follows:

1st. On first offer on lands in Benton county, $271.91.

2d. On second offer on lands in Polk county, $216.00.

3d. On third offer on lands in Linn county, $855.46.

Making an aggregate of taxes paid on the lands in Benton, Polk, and Linn counties of $1,343.37.

It must further be noticed that the objection of plaintiff to the admission of this evidence was according to the bill of exceptions (Record, 41) "on the ground that it was immaterial, *because the payment of the taxes was not sufficiently pleaded.*" And the objection was accompanied with the statement that plaintiff admitted that the *expenses* proved exceeded the rents or profits in the lands in Linn, Polk, and Benton counties respectively, and that he could claim nothing on account of the rents actually collected from any of these lands.

Under this state of the case, the question arises, did the court below err in excluding these records?

1st. As to the objection that the payment of the taxes was not sufficiently pleaded.

It is submitted an inspection of the pleadings will show conclusively that this objection is not well founded.

The defendant's answer (Record, 22) contains the following averments:

"That during said time" (referring to the preceding averments which states the time mentioned in the complaint) "the defendant expended and paid out for necessary repairs and improvements upon said Linn-county farm, *and for taxes thereon*, the sum of $8,000.00."

"That during said time the defendant *paid taxes upon said Polk county farm amounting to* $200.00, and upon that part of said lands lying in Benton county the sum of $200.00."

This last averment is in all respects *full*, *specific*, and *direct*, both as to payment of taxes by defendant during the time covered by plaintiff's claim and the *amounts paid respectively in each of the counties of Polk and Benton.*

It is true the averment in regard to the Linn county taxes might with entire propriety have been more definite and specific. It undoubtedly would have been better pleading had the amounts paid respectively for "necessary repairs and improvements" and "for taxes" been stated *separately* and the amount of each item given; but the averment, nevertheless, inasmuch as the plaintiff passed it by unchallenged and took issue with it in his replication, is sufficient.

(See Replication, Record, 24.)

The plaintiff, had he deemed the averments insufficient, could have demurred to them; or, if he regarded them as vague, indefinite, or uncertain, he could have called upon the court to compel the defendant to make his pleading more definite and certain, and not having done either, but on the contrary joined issue in his replication, he cannot be heard to object on the trial.

2d. In an action for *mesne* profits the amount expended by the defendant while in the occupation of the premises for *necessary repairs* and *legal expenses* ought to be deducted from the gross rents or value thereof, and the balance is the damage which the plaintiff has sustained and which he is entitled to recover.

Syllabus, case Semple *v.* Bank of British Columbia, 5 Sawyer, 395.

In the case just quoted, the court, Deady, Judge, after having ascertained the sum total of the rental value of the lands to be $4,400, said:

"From this must be deducted the amount expended during this period by the defendant for *legal taxes and necessary repairs*. The action for mesne profits is said to be an equitable one, intended to do justice to the plaintiff by putting him in as good a situation as he would have held provided he had not been dispossessed. (Tyler on E., 848.) Taxes paid by the defendant during his wrong-

ful occupancy are to be deducted from the gross rents in ascertaining the actual damage which the plaintiff has sustained by the loss of the possession. (Stark *v.* Starr, 1 Sawyer, 30.) The amount paid for taxes and repairs was $1,724, to which add $258.65 *interest on the same*, and the sum is $1,992 98, leaving a balance due the plaintiff of $3,407.02."

The court, moreover, in the case at bar, seemed to concede this to be the true rule, as did, also, the plaintiff in not excepting to defendant's answer in this regard and in joining issue in his replication.

The error in the court below was in treating the case, in so far as estimating the gross rental value and the gross necessary expenses were concerned, as though there were *four* separate actions instead of *one*, growing out of *four* separate mortgages instead of *one*, and in not treating *all* the lands covered by plaintiff's claim for rent as a *unit*—as *one* tract or parcel, instead of *many* tracts or parcels.

That is to say, the court should have first permitted evidence of the parties tending to show the aggregate amount of moneys received by the defendant from *all* the lands included in the mortgage and covered by plaintiff's complaint, or the aggregate amount of the rental value thereof, and then evidence tending to show the aggregate amount paid out by the defendant during the period named in the complaint for *necessary repairs and improvements* and for *legal taxes* on all the lands covered by the mortgage and included in the complaint, and this latter amount deducted from the former would, in the event of the plaintiff being entitled to recover at all, be the measure of his damages. Any other rule would, in case the necessary repairs and taxes on one particular piece of the ground covered by the complaint exceeded the rental value of that particular piece of land by $1,000, or $2,000, or any other amount, deprive the defendant of any return of moneys so paid out in excess, and would give the plaintiff

the benefit without compensation of such repairs and the payment of such taxes.

The question asked of the defendant, and of the court, by the complaint in this action, is this:

What was the *sum-total* of the reasonable rental value of *all the lands* included in the mortgage and covered by the complaint during the time for which it is claimed they were wrongfully occupied by defendant, *exclusive of all sums paid out by the defendant during said time on account of necessary repairs and legal taxes on all the lands in question?*

The court rightfully permitted evidence to the effect that the defendant had paid *all the taxes* legally levied on these lands during the time he occupied them, but wrongfully refused him the *only competent evidence* to show the *amount of taxes so paid*, and the case went to the jury without *any evidence* as to the amount of taxes thus paid, which, according to the evidence offered by defendant and excluded by the court, was as follows:

1st. On the lands in Benton county.....	$271.91
2d. On the lands in Polk county.....	216.00
3d. On the lands in Linn county.....	855.76
Total.....	$1,343.67

In Brobst *v.* Brock, 10 Wallace, 531, twenty-five adjoining tracts of lands belonged to one person; he sold them together as a whole to Smith, who in turn sold an undivided fourth part of the whole body to Michael Brobst by one deed. Brobst mortgaged his entire estate in the whole to Wood. After the debt secured by the mortgage fell due, the mortgagee placed a tenant upon the lands, whose actual occupancy, a *pedis possessio*, did not extend beyond the limits of a *single tract*. Held, that a possession of the whole *twenty-five tracts* as described in the deed must be presumed to have been taken by the mortgagee in right of the mortgage.

The court said: "From the beginning the entire body of land was treated as *one subject of grant or mortgage*, though held under several conveyances. * * * Having a right to enter only in virtue of the mortgage of which he was assignee, it is a legal presumption that his entry was in right of it, under color of his title, and that he intended to assert his claims to the *entire subject of the grant*. It follows that the entry transferred the possession of the *whole body of the land* from Brobst to Boyer, and that no matter where his *pedis possessio* was taken, he acquired possession *to the extent of the mortgage deed*.

The fact that the plaintiff accompanied his objection with the statement that he admitted that the expenses proved exceeded the rents or profits on the lands in Linn, Polk and Benton counties, respectively, and that he could claim nothing on account of the rents actually collected from any of *these lands*, could not add any force to the objection that it would not have had in its absence; nor could it have any effect whatever, save perhaps to mislead the court below in the progress of the trial, which it seems it did most effectually; nor was the error in any manner cured, or its evil and very damaging effects on the rights of the defendant to any extent dissipated, by the subsequent instruction of the court to the jury, to the effect that the plaintiff was not entitled to recover anything on account of the use and occupation of the lands in Linn, Polk and Benton counties, or for any rents or profits received by the defendant therefrom. (Record, 42.)

As was correctly stated by the court in Semple *v.* Bank of British Columbia, 5 Sawyer, 395, *supra*, quoting from Tyler on E., 848, "the action for mesne profits is said to be an equitable one, intended to do justice to the plaintiff by putting him in as good a situation as he would have

held provided he had not been dispossessed." (Tyler on E., 848.)

The question, therefore, in this action is this: how much rents and profits *in the aggregate* would the plaintiff have received from *all the lands* included in the mortgage, and the possession of which it is claimed the defendant wrongfully detained, during the time of such detention, had he (the plaintiff) had the possession thereof, and how much *in the aggregate* would he during such time have been compelled to pay out for *necessary repairs* or *legal taxes* on all said lands? The difference between these two amounts would be the measure of plaintiff's damage for the wrongful detention.

Furthermore, it must be borne in mind that there were but *two* grounds of objection urged against the introduction of this evidence, consequently no other can now be urged. The first objection—to wit, because the payment of taxes was not sufficiently pleaded—it has been already shown was not well founded; while the other objection—namely, the admission of plaintiff to the effect that the *expenses proved* exceeded the rents or profits of the lands in Linn, Polk, and Benton counties, respectively—so far from affording a reason why defendant should not be permitted to show the *amount of taxes* he had paid on these lands, was, in connection with a *prior* admission of the defendant (Record, 40) to the effect that the rents of the property in block 39, in Portland, during the period complained of, exceeded the necessary expenses of keeping the same in repair and the taxes thereon by a sum greater than $3,000, and that the rents received from the property in block 2, in Portland, during the period complained of, exceeded the necessary expenses of keeping the same in repair and the taxes thereon by a greater sum than $2,400—a forcible argument in itself why the defendant should be permitted to show the amount of taxes paid by him on these portions of the lands in controversy,

to the end that a proper balance might be struck by the jury, between the *aggregate rents and profits* received by defendant and the *aggregate amount paid out by him* for plaintiff's benefit in necessary expenses *and legal taxes.*

Point XI.

There is in the *opinion* of the court below, accompanying the decision overruling the demurrer to complaint, a statement to the effect that certain *admissions* were made in the argument of the demurrer by *counsel for the defendant Teal.* This, it is submitted, is no part of the record, and cannot be taken into account by this court.

The fact that the court below, in an opinion which accompanies the record, has stated some of the facts as he understood them, does not alter things, the facts stated not being stated as a *special finding*, but rather advanced to show why the judge came to the conclusion he did. So this court held in—

Dickinson *v.* The Planters' Bank, 16 Wall., 251.

Conclusion.

The plaintiff states himself out of court. He brings an action to recover damages on account of a failure on the part of Goldsmith to perform one of the covenants in a certain mortgage contract, to wit, by not surrendering possession of the mortgaged premises on default of payment of an instalment due; and shows in the same complaint, and confirms it in the replication, that said mortgage had been foreclosed, a decree rendered, and all the mortgaged property sold prior to the commencement of this action. The case would be no more decisive against the plaintiff if he had brought his action to recover the face of a promissory note, averring its execution and delivery on *one* page of his complaint, and on *another* page of the

complaint alleging that on a certain date the said note had been fully paid; *or*, on a certain date, a judgment had been duly rendered on it by a court of competent jurisdiction. In either case the note is dead, is *functus officio;* cancelled by payment in the one case, *merged* in the judgment in the other. So here the mortgage, and the *whole of it*, is *merged* in the *decree* in the foreclosure proceedings, and there is no covenant, or provision, or part of it, remaining upon which an action can be brought or be maintained. Hence there is, for this reason, not only a failure to state facts sufficient to constitute a cause of action, but a positive averment to the effect that there is no *subject-matter* to which the jurisdiction of the court could possibly attach.

But not only so, it is clear that whatever rights plaintiff had under the mortgage, either to a lien on the land, to the land itself, or to the rents or profits, those rights, whether legal or equitable, were all concluded—forever extinguished—by the proceedings of foreclosure and sale, whether such rights flowed *directly* from the covenants or stipulations of the mortgage, or resulted as *incidents* therefrom. And now the plaintiff seeks to maintain an action against the owner of the equity of redemption, or at least to recover rents and profits while he was the owner of the equity of redemption, when no such action could possibly lie against the mortgagor himself. Furthermore, the plaintiff, while basing his action on a covenant or provision in a mortgage that has been swallowed up in a decree of foreclosure, and praying damages for a failure to keep said covenant, or comply with the provision sued upon, he measures such damages by the rents and profits received, or alleged to have been received by defendant while occupying, or in possession of, the *undivided half* of certain lands, the title and right to the possession of the *other* undivided half of which are conceded by plaintiff to have been in defendant during the time covered by the complaint. In

other words, that during the time covered by plaintiff's claim the plaintiff and defendant were tenants in common of the lands in question; hence defendant, in any possible view, had the right to receive the rents and profits, and could only be held to account to plaintiff after *demand* in an action or suit for such purpose, charging defendant as bailee, and *not* through an action on a covenant or stipulation of a *dead mortgage*. And it is not pretended any demand was ever made for plaintiff's alleged share of the rents and profits. If Goldsmith failed to keep any of the covenants or conditions of the mortgage contracts in question, the place to seek the remedy was in the suit for foreclosure, where a court of equity had full jurisdiction of the whole subject. Courts will not permit separate actions or suits on each stipulation of a contract, much less will they tolerate an action where, as stated by this court in the case of Eldred *v.* Bank, 17 Wall., (opinion by Mr. Justice Miller,) "*there is a complete bar found to it in the record.*"

Respectfully submitted.

JOHN H. MITCHELL,
Attorney for Plaintiff in Error.

111-242

OFFICE SUPREME COURT U.S.
FILED
MAR 19 1884
JAMES H. MCKENNEY, Clerk.

Supreme Court of the United States.

October Term, 1883.—No. 280.

JOSEPH TEAL, PLAINTIFF IN ERROR,

vs.

JAMES D. WALKER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

Brief for Defendant in Error.

The defendant in error, a British subject, sued the plaintiff in error in the court below, in an action at law, to recover sixteen thousand dollars, damages alleged to have been sustained by him in the refusal of the plaintiff, a citizen of Oregon, to deliver to him the possession of certain real estate in that State, and wrongfully withholding it from him for one year four months and twenty-four days; and, after describing the property, a statement is made of the damage incurred by the failure to deliver each piece or lot.

The facts necessary to be here stated are these:

On August 19, 1874, the defendant, Joseph Teal, and Bernard Goldsmith, being the joint owners and tenants in common of the farms aforesaid, conveyed the same to Henry Hewett by a conveyance absolute in form, but, as set forth in a contemporaneous declaration and agreement

signed by the plaintiff and defendant and said Hewett and Goldsmith, to be held by him in trust as a security for the payment of a note then made by said Goldsmith for the sum of $100,000, and made payable to plaintiff, or order, two years after date, with interest at one per centum per month, payable monthly, with a stipulation that if default was made in the payment of the interest for the period of twenty days the whole sum of the note should, at the option of the holder thereof, become due and payable at once.

By the declaration of trust it was stipulated and provided: (1) That Hewett held the legal title to the property, subject to the right of Teal and Goldsmith to retain possession of the same, and to take and have, without account, the issues and profits thereof—they paying all taxes and public charges imposed thereon—until said note should become due and remain unpaid thirty days; (2) that if such default is made in the payment of said note, Goldsmith and Teal "will and shall, on demand, peacefully surrender to said Hewett" the possession of said property, who "may and shall proceed and take possession" of the same, "and on thirty days' notice in writing to said Teal and Goldsmith * * * requiring them to pay said debt, * * * and on their failure so to pay, shall sell the same at public auction on not more than thirty days' notice," or sufficient thereof to pay the debt and charges.

On August 18, 1876, there was due upon said note the sum of $96,750, when, at the instance of said Goldsmith, it was agreed between the plaintiff and defendant and Hewett and Goldsmith that the time of payment thereof should be extended one year, but upon the stipulation as aforesaid, that if default was made in the payment of the principal or interest the whole sum should "become due and payable as provided in said agreement of August 19, 1874;" and the said Goldsmith, in consideration of such extension, then conveyed to said Hewett the lots aforesaid by a conveyance absolute in form, but, as set forth in said agreement of August 18, 1876, to be held by him as an additional security for the payment of the note aforesaid, and in the manner and for the purposes mentioned in the agreement of August 19, 1874, which agreement was not to be thereby annulled or set aside except so far as the latter might conflict with the former, but the two agreements were "to be taken and construed together."

In April, 1877, Goldsmith made a conveyance of all the property which he had conveyed to Hewett, as aforesaid, to the defendant Teal, and gave him possession thereof.

On July 6, 1877, no part of said principal having been paid nor any of the interest arising thereon after January 21, 1877, "Hewett demanded from the defendant the possession of all said lands in pursuance of the provisions of said contracts," but the latter refused to surrender "any part" of the same and held possession thereof until November 30, 1878, and received the rents and profits therefrom during said period.

All the lands aforesaid have been sold, either at private or judicial sale, and the proceeds applied upon the plaintiff's debt, but there is still due thereon from said Goldsmith over $50,000, and since April, 1877, he has not had any other property out of which any part thereof could be made.

To the complaint setting up these facts Teal demurred, and his demurrer was overruled, (p. 13, Trans.) The opinion of the judge before whom the case was tried below is an ample response to any question that may be attempted to be raised here growing out of or connected with the sufficiency of the complaint, (p. 13 *et seq.*, Trans.)

The demurrer was general, and indicated no particular defect in the complaint; but from the opinion of the court below we are fully informed as to the points made. But here in this court we are met by a motion to dismiss, because the matters stated are not cognizable in an action of law, and because the decree of foreclosure appearing in the case extinguished the rights of Walker. In a nutshell, the matter is this: The property under trust, when sold, did not pay more than two-thirds of the debt; whereas if the trustee had been admitted into possession he might have applied the rents and profits on the interest and ultimately paid the whole debt by a favorable disposition of the property, and this failure of admitting to possession is the cause of the damage. In other words, Walker says that by the refusal of surrender of possession of the prop-

erty when demanded in July, 1877, and holding it till November, 1878, (and in fact it is admitted in the record that W. was entitled to possession after default of payment of the notes January 21st, 1877, Trans., p. 16,) the property failed to pay the debt, and rents and profits during that time to which he was entitled were not paid to him, and he is thus damaged. (See opinion court below, Trans., p. 19 *et seq.*) How the foreclosure can bar this it is impossible to see, and why this is not a matter of legal as distinguished from equitable inquiry, it is equally impossible to tell.

Teal promised and undertook with Goldsmith that if Walker would wait one year longer the debt should be paid. This agreement *to forbear* is a valid consideration for a promise, and in the shape here presented makes Teal a principal debtor.

1 Parsons Cont., 444; 2 Ib., 10.
Burge on Suretyship, 11, 221.
Pitts *v.* Congdon, 2 N. Y., 352.

Not only did Teal fail to keep his engagement, but he violated it pointedly and directly, and withheld the property security for the debt, to the damage of Walker. Goldsmith is insolvent. All the property is appropriated to the payment of the debt, after being withheld something like a year and five months after demand for its possession, and after it had all been conveyed to Teal; and much of the debt is unpaid. Should the court interpret this as merely a proceeding to collect more of the debt, this objection by Teal could not weigh, as Walker can proceed in many ways at the same time to enforce payment until he gets satisfaction. He can foreclose, sue at law upon the debt, and bring an action for possession of the property mortgaged or subject to lien, and besides proceed upon any other securities he may have. See Ober *v.* Gallagher, 93 U. S., 199, where all this matter of the note being merged in the judgment or decree, was pressed upon this

court to no purpose. (See also Hughes *v.* Edwards, 9 Wheat., 489.) So that if this were a proceeding simply to follow another remedy to get his debt, W. could pursue it, and there would be nothing in the objection against it. It is just as under a mortgage where the debt is the principal thing, yet all remedies are open to the creditor till he obtains satisfaction. (2 Hilliard Mort., 103.) But this is something more. W. says Teal, who undertook to make good this debt, got possession of property subject to the payment of the debt, and withheld possession of it long after demand, and so long as to damage W. to a very large amount. If, even under this state of case, W. had collected his entire debt out of the property, yet, if he could have shown a violation of T.'s undertaking by T. in withholding property to the possession of which W. was entitled so long as to damage W., he could recover for this. W. was entitled to the lands in 1877, but he did not get them for more than a year after that; being entitled to the lands at that time, he was entitled to the rents and profits for the time so withheld. No argument is needed on this. In other words, T. withheld from W. a legal right—the right of possession of these lands; and the result of the injury complained of is what these lands were worth during that withholding. (2 Greenleaf Ev., section 253, and notes; section 261, and notes.) What were those lands for the purposes of this transaction but their rents or profits? (2 Greenleaf Sup., section 332; 1 Sedgwick Dam., 243–253.) Certainly, then, the act of March 3, 1875, (ch. 137,) and the several decisions of this court upon that (104 U. S., 450; Ib., 209, 106; Ib., 537; Ib., 586,) as to feigned, manufactured, or collusive suits, or suits not really between citizens of different States, can have no bearing here.

Considering that Teal pleaded over in the court below, and saved no question upon the ruling of the court on the jurisdiction of the cause and the sufficiency of the com-

plaint, but pleaded a set-off, and prayed judgment on it, this court is not favorable to another presentation of that matter here; and the effort to present this objection—whatever it is—like an error apparent in the record, that might be examined here without any exception, is entirely too strained and far-fetched.

Storm *v.* U. S., 94 U. S., 81.
R. R. *v.* Trustees, 91 Ib., 130.
Ins. Co. *v.* Piaggio, 16 Wall., 386.
12 Wall., 403; 10 Ib., 261; 3 Ib., 661; 1 Ib., 601.
20 How., 433; 4 Ib., 143.

For the stereotyped language of this court on this point, gathered from the cases just cited, is: "Alleged errors, not presented by a bill of exceptions, nor apparent on the face of the record, are not proper subjects of re-examination by writ of error in this court."

And see especially:
Marine Bank *v.* Fulton Bank, 2 Wall., 252.
Providence *v.* Babcock, 3 Wall., 240.

The plaintiff in error, after the demurrer was overruled, answered the complaint (pp. 22, 23, Trans.) denying that on 6th July, 1877, or at any time, any demand for possession and his refusal to deliver; that he collected rents on the undivided half of lot six and the undivided half of the south half of lot seven, amounting to eighty dollars, or any greater sum than seventy-five dollars per month; and averring that during the period mentioned the premises were not at all times rentable, and seventy dollars per month was a reasonable rent; denying the rental value of the undivided half of the Linn County farm was $1,500 per year, or more than $256.20; denying rental value per year of undivided half of Polk and Benton County farm to be $5,000; insists upon credit for one-half of improvements and taxes on certain of the property of $409.28; re-

pairs, improvements, and taxes on Linn County farm, $8,000, and taxes on Polk and Benton County farm, $400; and he then claims for services and attention in managing the lands, $3,000; denies necessity of employing and paying counsel, and finally denies damage to Walker of $16,000, or any other sum, but insists that he (Teal) is damaged $3,500, and prays judgment, &c.

To this answer Walker replied (pp. 24, 25, Trans.) denying Teal's claim for improvements, repairs, taxes, outlays, and for services and attention, and prays as in his complaint. Upon the trial of the issues thus presented a verdict and judgment were rendered in favor of W. for $5,345.88, (pp. 30, 31, Trans.)

Teal moved for a new trial, (p. 32, Trans.,) and this motion was overruled and exception saved; but as this is not a question for review here, (*Laber* v. *Cooper*, 7 Wall., 565,) no further notice need be taken of that.

The Trial Below.

On the trial, the plaintiff, to maintain the issues on his part, called as a witness John Catlin, who testified that in the spring and summer of 1877 he was one of the attorneys engaged in efforts to collect the note of B. Goldsmith to James D. Walker described in the written contract embodied in the complaint in this action, and was employed to foreclose the mortgage or trust deeds described in the complaint, which had been executed by B. Goldsmith and wife and defendant Teal and wife as security for said note; that he was employed by Henry Hewett, the trustee mentioned in the contracts, to get possession of the lands described in the trust deeds, and that on the 6th day of July, 1877, as the attorney of Hewett, he delivered a written demand to defendant Teal, and to W. H. Effinger, the attorney of B. Goldsmith; a paper, of which the following is a copy, was then shown witness:

"To Joseph Teal and B. Goldsmith.

"GENTS: The promissory note executed by B. Goldsmith to James D. Walker for $100,000, bearing date August 17, 1874, in words and figures as follows:

"$100,000. PORTLAND, OREGON, *August* 19, 1874.

"Two years after date, without grace, for value received, I promise to pay to James D. Walker or order one hundred thousand dollars, with interest thereon from date till paid, interest to be paid monthly. Principal and interest to be paid in gold coin of the United States, and not otherwise, at the Bank of Falkner, Bell & Co., in the city of San Francisco, California, and if there be default in the payment of interest for the period of twenty days, then the whole sum, principal and interest, shall, at the option of the holder of this note, be immediately due and payable. Provided, that at any time after one year from date before maturity of this note the same, or any installment of not less than twenty thousand dollars, exclusive of interest, may, at my option, be paid on thirty days' notice to the holder.

(Signed) "B. GOLDSMITH.

"is due and no payments have been made thereon, excepting the interest up to the 21st day of December, 1876, and $3,250 of the principal sum prior thereto, and a further payment of $5,400 of the principal sum on the 10th day of April, 1877, leaving now due of the principal sum $91,350, with interest thereon from the 10th day of April, 1877, and interest on the sum of $96,750, from December 21st, 1876, to April 10th, 1877, the whole of which unpaid principal and interest is now more than thirty days overdue. I therefore demand the possession of all the lands, and of every parcel thereof, conveyed to me by yourselves and your respective wives, by your joint deeds, three of which deeds bear even date with said promissory note, and the other deed bears date the 14th day of October, 1876, which lands were conveyed to me in trust to receive the payment of said promissory note, according to the several written declarations of trust executed by yourselves and James D. Walker, and myself, the first of which bears even date with said three first deeds, and the other bears date the 18th day of October, 1876, by virtue of and in accordance with the said declarations of trust, and by reason of the said default in the payment of said principal and interest, I now make this demand for the possession of said lands conveyed to me as aforesaid.

"Dated July 3d, 1877. HENRY HEWETT."

Whereupon the witness further testified that the paper shown him was a copy of the paper he delivered to defendant Teal on the 6th of July, 1877; that the paper he delivered to defendant Teal and the paper now shown him were both signed by Henry Hewett, and were in all respects alike, and he considered them both originals; but that the paper now shown him was not the same paper that he delivered to defendant Teal.

No evidence was offered tending to show the loss or destruction of the paper delivered to the defendant, or to

account for its non-production, and no demand was claimed to have been made upon defendant for the production of the paper to be used at the trial.

The plaintiff then offered the paper shown to the witness as evidence, and proposed to read it to the jury; the defendant by his counsel objected, on the ground that it was not the original paper delivered to defendant, and was incompetent to be used as evidence of the contents of the original paper.

The court overruled the objection of defendant, and permitted the paper to be read to the jury; and to this ruling and decision the defendant then and there excepted.

The plaintiffs called as a witness Robert Sinnott, who testified in substance that in the years 1877, '78, and '79 he leased parts of lots 6 and 7, in block 2, city of Portland. That some time in July, 1877, Hewett notified him not to pay any more rent to Teal; that he informed Teal of the notice, and that Teal told him not to pay any attention to the notice. It was thereupon admitted by defendant's counsel in open court that the other tenant in block 2 would testify to the same effect.

There was no evidence offered on the trial tending to prove a demand by the plaintiff or by Henry Hewett for the possession of the lands conveyed by the trust deeds, or any part thereof.

Further to maintain the issues on his part the plaintiffs called as a witness E. P. Coleman, who testified that during the years 1877 and 1878 and 1879 he was in the employ of the defendant Teal, and as his agent had charge of the lands in Linn county; that during that period one hundred and sixty acres of those lands were rented to and occupied by one [—] Kraal; that another tract of those lands, including about sixty or seventy acres of plow land, was rented to and occupied by one [—] Tethero; and that another tract of those lands, including about forty acres of plow land, was rented and occupied by one [—] Cobble; and that each of these tenants paid as rental for the land occupied by him one-third of the grain raised by him, which was delivered at the farm "in the half-bushel;" that he sold the grain received for rental at Harrisburg, and received the money therefor, amounting in the aggregate to about $1,267.44.

He further testified that during the same period he re-

ceived for the hire of pasturage for stock upon the Linn county lands $300, and for timber sold off these lands about $25, and that he accounted to defendant Teal for all the moneys received for the grain sold, for the pasturage, and for the timber.

It was admitted on the trial by defendant's attorneys that during all the time, from July 6th, 1877, until November 30th, 1879, defendant held possession and control of all the farms described in the complaint, and had the use and occupation thereof to his own use.

Plaintiff then called as a witness Luther White, who testified that he was acquainted with the Linn county lands, and that there was under cultivation of said lands, in 1877, 1878, and 1879, about two hundred acres, and that the Linn county lands embraced about one thousand acres of level prairie lands and about five thousand five hundred acres of "foot-hill" lands and several hundred acres of rough timbered lands.

Plaintiff then called as a witness Gallatin Adkins, who testified that the lands in Polk and Benton counties lie together in one body, and the line between the counties passes through them; that he, witness, had been living on those lands ever since the fall of 1877, a part of the time on a tract called the "Jewett Place," and a part of the time on a tract called the "Fuller Place;" that from the fall of 1877 to the fall of 1878 he occupied the "Jewett Place" as undertenant to one Tillard, who held the lands as tenant of defendant Teal, and that for the rental of the "Jewett Place" he paid Tillard one hundred and ten bushels of wheat.

Plaintiff then called as a witness Green B. Smith, who testified he was well acquainted with the lands in Polk and Benton counties; that there was in cultivation on the "Jewett Place" about eighty or one hundred acres, and on the "Fuller Place" seventy-five or eighty acres; that he saw the crops growing on those places, but could not state what amount was produced.

There was no other evidence showing what the income of the lands in Linn, Polk, and Benton counties was during the period for which plaintiff sued for the use thereof.

Plaintiff then proved, and the defendant by his counsel admitted, that the rents received from the property in block 39, in Portland, during the period complained of, exceed the necessary expense of keeping the same in repair and

the taxes thereon by a sum greater than $3,000, and that the rents received for the property in block 2, in Portland, during the period complained of, exceeded the necessary expense of keeping the same in repair and the taxes thereon by a sum greater than $2,400.

The plaintiff then rested his case, and the defendant to maintain the issues on his part called as a witness E. P. Coleman, who testified that it cost during the years 1877, 1878, and 1879, to prepare the wheat received by him as rental for the Lynn county farm and to convey the same to market, about 20 cents per bushel; that wheat was sold for 75 cents per bushel; that there were about [—] miles of fencing on the Linn county lands, and that the cost of labor and materials in keeping up the fencing and buildings, and from improvements, and not including his own compensation for taking care of the property, was about $1,000 per year; that this expense was necessary to prevent the property from falling into decay and being wasted.

The defendant, as a witness on his own behalf, testified that the income of the lands in Linn, Polk, and Benton counties had never been equal to the cost of necessary repairs. He then testified that he paid all the taxes assessed and levied upon the lands in Polk and Benton counties, at the annual assessments and levies made in the fall of 1877, 1878, and 1879, and all the taxes assessed and levied upon the lands in Linn county, at the annual assessments and levies made in the fall of 1877 and 1878, and that he paid all said taxes before the commencement of this action.

The defendant then offered in evidence certified copies of the assessment rolls of the county of Benton for 1877, 1878, and 1879, with the levy of taxes extended thereon, for the purpose of showing the amount of taxes paid on the lands in that county upon those assessments respectively, and showing the amount of taxes levied and paid to be on the levy made in the fall, September, 1877, $83.67; on the levy made in September, 1878, $94.12; on the levy made in September, 1870, $94.12; one-half of these several assessments having been paid by defendant on plaintiff's interest in said lands.

The plaintiff objected to the introduction of this evidence, on the ground that it was immaterial, because the payment of the taxes was not sufficiently pleaded, accompanying the objection with the statement that he admitted that the

expenses proved exceeded the rents or profits in the lands in Linn, Polk and Benton counties respectively, and that he could claim nothing on account of the rents actually collected from any of these lands. On this admission the court sustained the objection to the introduction of the assessment rolls and levy, and excluded the same; and to this ruling and decision of the court, the defendant by his counsel then and there excepted.

The defendant then offered in evidence certified copies of the assessment rolls of the county of Polk, for 1877, 1878 and 1879, with the levy of taxes extended thereon, for the same purpose for which the assessment roll and levy for Benton county had been offered, showing the amount of taxes levied and paid upon the lands in Polk county to be, on the levy made in September, 1877, $68.00; on the levy made in September, 1878, $74.00; on the levy made in September, 1879, $74.00; one-half of these several amounts having been paid by defendant on plaintiff's interest in said lands.

The defendant objected to the introduction of this evidence, on the ground that it was immaterial, in view of the admission made when the assessment rolls of Benton county were offered.

The court sustained the objection, and excluded the evidence, and to this ruling and decision the defendant by his counsel, then and there excepted.

The defendant then offered in evidence certified copies of the assessment rolls of the county of Linn for the years 1877 and 1878, with the levy of taxes extended thereon, for the purpose of showing the amount of taxes levied and paid on the lands in that county, and showing the amounts to be: on the levy made in September, 1877, $408.49; on the levy made in September, 1879, $447 27.

The plaintiff objected to the introduction of this evidence on the ground that it was immaterial, in view of the admission made when the assessment rolls of Benton county was offered. The court sustained the objection and excluded the evidence, and from this ruling and decision of the court the defendant, by his counsel, then and there excepted.

The points then really before the court on exceptions, and which alone the court is called on now to pass upon, are not many, nor are they difficult or complicated.

A witness for Walker testified (Trans., p. 39) the paper shown him was just like a paper he had delivered to Teal on 6th July, 1877, but it was not the identical same paper, but like in all respects, and both were originals. Teal objected to this, as no evidence was offered to prove loss. Really no loss was alleged. The truth is the two papers were duplicates, and if there was a difference or variance in them at all material, Teal having one in his possession could have shown it. The court very properly, against Teal's objection, permitted the paper to be read. This was confounded with the effort to let in secondary evidence without proof of loss of the original, but it was simply proving by a witness he delivered one of duplicate papers to Teal and then read the one he kept. This was proper. (1 Greenleaf Ev., §§ 558 et seq. and notes.) Even if what was offered on the trial was a copy, (or secondary evidence,) and not of equal grade with the one Teal had, it being proved he (T.) had the original, the rule would have been complied with in permitting this to be read. (Ib.)

The second exception is (p. 41, Trans.) to the ruling out of certain tax-books and assessments to show amount of taxes claimed by Teal, &c. Walker admitting the expenses proved exceeded the rents and profits on the land upon which these taxes are claimed, rendered the proof unnecessary, and the court therefore rejected it. After the plaintiff (W.) admitted this, the evidence was entirely useless. The court committed no error in not hearing it. He had by this admission all he could ask, and hence there could be no error to complain of.

The third exception (Trans., p. 41) is of the same kind precisely, and so of the fourth and last exception, (Trans., p. 42.) It is scarcely worth while to vex this court with citations to the effect the court did not err in rejecting a mass of documents and papers to burden the record with, when the opposite party admitted all that Teal desired to establish, and the purpose and object of establishing it.